

THE
MAMLATDARS' COURTS ACT, 1906.

BEING

(**BOMBAY ACT No. II OF 1906**)

WITH

EXPLANATORY AND CRITICAL NOTES AND NOTES FROM THE
DECISIONS OF THE HIGH COURTS IN INDIA.

by

VENKATRAO RAMCHANDRA.

PLEADER, HIGH COURT, BOMBAY.

FIFTH EDITION.

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THE
MAMLATDARS' COURTS ACT

BEING

BOM. ACT No. II OF 1906.

An Act to consolidate and amend the law relating to the powers and procedure of Mamlatdars' Courts.

[The assent of the Governor-General of India to this Act was published by the Governor of Bombay on the 29th October, 1906.]

WHEREAS it is expedient to consolidate and amend Preamble (A). the law relating to the powers and procedure of Mamlatdars' Courts; It is hereby enacted as follows :—

When the bill of this Act was under consideration, several proposals were made. One of these was that the Mamlatdars' Act should be done away with altogether and the jurisdiction should be transferred to Subordinate Judges (a). But the past experience for about three quarters of a century convincingly shows that this Act was much availed of and found very beneficial, not only by the Zamindars and Inamdar or by the agricultural population, but by all other people. The Act is very much liked by the people, not only on account of the simplicity of procedure, but on account of the speediness and cheapness of

(a) See the Legislative Proceedings published in the Bombay Government Gazette, dated 26th September 1906, Part VII, page 189.

the remedy it affords. So far as the possessory suits are concerned, the condition of the country is not so different now from what it was when this jurisdiction was first created. The facilities afforded by railways do not make the Sub-Judges' Courts more easily accessible than Mamlatdars' Courts. So far as the question of distance is concerned, there is no great disadvantage either way. In some cases the rural inhabitants of villages may find the distance to the Sub-Judge's Court somewhat great; in other cases they have to walk a considerable distance to attend the Mamlatdars' Courts. As regards ability and the quality of work, both the Sub-Judge and the Mamlatdar stand almost on an equal footing. Now-a-days both these officers are mostly University Graduates and both perform judicial work, and both are guided by the same law of evidence. Whether an officer of either of these two classes is efficient in his work, depends, not so much upon his academical training or the nature of his work, as upon his deep legal knowledge, general competency, industry and by far upon his honesty and goodness. Nor should preference be given to the Sub-Judges' Courts, because parties have to incur greater expenses in taking pleaders to Mamlatdars' Courts. The number of pleaders has now enormously increased, while the quantity of work has much decreased. Consequently parties would find little difficulty in securing the assistance of pleaders.

(A) " PREAMBLE. "

The preamble of a statute has been said to be a good means to find out its meaning, and, as it were, a key to the understanding of it; and as it usually states, or professes to state, the general object and intention of the Legislature in passing the enactment, it may legitimately be consulted for the purpose of solving any ambiguity, or fixing the meaning of words which may have more than one, or of keeping the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt (a).

[*Preamble—Construction of Act.*] Where the enacting sections of a statute are clear, the terms of the preamble cannot be called in aid to restrict their operation or to cut them down.—QUEEN-EMPERESS v. INDARJIT, I. L. R. 11 All. 262 ; CHINNA ALYAN v. MAHOMED FAKRUDIN SAIB, 2 Mad. H. C. R. 322.

[*Construction of Act—Duty of Court.*] Where the terms of an Act are clear and plain, it is the duty of the Court to give effect to it as it stands.—GUREEBULLAH SIRKAR v. MOHUN LALL SHAH, I. L. R. 7 Cale. 127 ; S. C. 8 Cale. L. R. 409 ; QUEEN-EMPERESS v. HORI, I. L. R. 21 All 391.

[*Objects and reasons for Act—Report of Select Committee on Bill—Intention of Legislature.*] The objects and reasons given by the Legislature on the introduction of a Bill, and the Report of the Select Committee on it, may be referred to in construing any Act to show the intention of the Legislature in passing it.—QUEEN-EMPERESS v. KARTICK CHUNDER DAS, I. L. R. 14 Cale. 721 ; ROMESH CHUNDER SANNYAL v. HIRU MONDAL, I. L. R. 17 Cale. 852 ; RAMCHANDRA JOISHE v. HAZI KASSIM, I. L. R. 16 Mad. 207 ; ADMINISTRATOR-GENERAL OF BENGAL v. PREM LALL MULLICK, I. L. R. 21 Cale. 732 ; the same in the Privy Council, I. L. R. 22 Cale. 788, S. C., L. R. 22 I. A., 107.

[*Debate on Bill in Legislative Council—Construction of an Act.*] For the purpose of construing an Act, the debate upon the Bill, when before the Legislative Council, is not to be referred to.—GOPAL KRISHNA PARCHURE v. SAKHOJIRAV, I. L. R. 18 Bom. 133 ; ADMINISTRATOR-GENERAL OF BENGAL v. PREMLAL MULLICK, I. L. R. 22 Cale. 788 ; S. C., L. R. 22 Cale. 107 ; QUEEN-EMPERESS v. SRI CHURN CHUNDO, I. L. R. 22 Cale. 1017 ; QUEEN-EMPERESS v. BAL GANGADHAR TILAK, I. L. R. 22 Bom. 112.

[*Speculation upon the intention of the Legislature—Words of the Act.*] If the words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been the reasons for enacting it.—JADDOONATH BOSE v. SHUMSOONISSA BEGUM, BAZLOOR RUHEEM v. SHUMSOONISSA BEGUM, 8 W. R., P. C. 3 ; S. C. 11 Moore's I. A. 551 ;

MOHESH CHUNDER DOSS v. MADHUB CHUNDER SIRDAR, 13 W. R. C. R. 85.

[*Construction—Effect of illustrations.*] Illustrations in Acts of the Legislature ought never to be allowed to control the plain meaning of the section to which they are appended, especially when the effect would be to curtail a right which the section in its ordinary sense would confer.—KOYLASH CHUNDER GHOSE v. SONATUN CHUNG BAROORE, I. L. R. 7 Calc. 132.

History of the Law.

[*Bom. Reg. XVII of 1827—Bom. Reg. VI of 1830—Act XVI of 1838—Bom. Act V of 1864.*] The authority of the Collector to deal with cases of immediate possession under Regulation XVII, Chapter VIII, of 1827 might, according to the provisions of Regulation VI of 1830, be delegated to the Mamlatdar (Kama-visdar) in the sense of the suits being referred to the inferior officer when the property was of less value than Rs. 500. The power of delegation was in practice construed more widely ; and with the sanction of the Collectors, Mamlatdars throughout the Bombay Presidency used to deal with claims to immediate possession, subject, as provided in section 5 of Regulation VI of 1830, to an appeal to the Collector. Doubts eventually arose,—and not without some reason,—as to the legality of the proceedings thus held by Mamlatdars without a special reference on the part of the Collectors, and eventually Bombay Act V of 1864 distinctly constituted the Mamlatdars Judges of original jurisdiction for the trial of claims to immediate possession arising under Act XVI of 1838, Section 1, Clause 2, by which the earlier Regulation law had been superseded. What that Act says is that “ It shall be lawful for the Revenue Courts to give immediate possession of all lands to any party dispossessed of the same.” The only Revenue Courts contemplated in 1827 had been the Collector’s Court. After 1830 it might be said that the Mamlatdar’s was a Revenue Court empowered, therefore, to deal with a claim to immediate possession. On the other hand, it might be said that having authority to deal only with cases referred to him, the Mamlatdar was not a judge and his Kacheri was not a Court except when such reference had been made. The latter may have

been the more sound interpretation, but the former was the one which was accepted and acted on down to the year 1864.—RAM-CHANDRA v. GUNVANTRAO, Prin. Judg. for 1878, p. 269.

[*Revenue Courts—Civil Courts—Concurrent Jurisdiction.*]

Reg. XIV of 1827, Chap. VIII (extended by Regs. V and VI. of 1830) gave extensive jurisdiction to the Revenue Courts in the adjustment of the respective rights of parties, in cases which relate to land and its rent and produce. Those powers were altered by Act XVI. of 1838, Section 1, by which it was enacted, in modification of the rules contained in Chap. VIII of Reg. XVII of 1827, that all suits in regard to tenures, and the nature and extent of the interest and advantage, which in virtue thereof should be enjoyed by the parties concerned, and all suits in which the right to possession of land, or of the watans of hereditary district or village officers is claimed, shall be brought in the Courts of Adalat and the Courts subordinate thereto, and not in the Courts of Revenue : Provided, nevertheless, that it shall be lawful for the Revenue Courts to give immediate possession of all lands, premises, trees, crops, fisheries, and of all profits arising from the same to any party dispossessed of the same or of the profits thereof, provided application be made to them by such party within six months from the date of such dispossession. By this Act the power of the Civil Court to entertain all suits in regard to tenures &c, and all suits in which the right to possession of land &c., is claimed, was revived, the prohibition to hear such suits being hereby removed. And although the Bom. Act No. V. of 1864, gives to Mamlatdars the power to hear and decide suits in regard to immediate possession, it does not follow that the Civil Courts have no power to decide suits of the same nature. On the contrary the Civil Procedure Code declares that they shall have such jurisdiction, there being no Act of the Government of India and no Regulation of the Bombay Code, by which their cognisance of the suits is expressly barred. Consequently the Civil and Revenue Courts have concurrent jurisdiction.—*Ex parte NAGOYA KOM JAKAN GAUDA*, 3 B. H. C. R. A. O. J. 108.

[*Bom. Act V of 1864—Amendment of law—Right to water.*]

The Collectorates in the Bombay Presidency are subdivided into small portions called Talukas, which are presided over by native re-

venue officers called Mamlatdars, who are, therefore, conveniently situated for the purpose of settling on the spot, and without loss of time, any dispute which may arise with regard to possession at any time of the year, but especially at the critical period, the monsoon. It was, therefore, enacted in 1864 by Act V of 1864 that the Mamlatdars should have summary jurisdiction in cases where people had been dispossessed or kept out of possession of lands, premises, trees, crops, fisheries and of all profits arising from the same. That Act had been in force for eleven years, but it was found to be defective, inasmuch as it gave no powers to the Mamlatdars to settle disputes with regard to the rights to wells, water-courses, &c. A delay of a few days in deciding the right to take water from a well or water-course might prevent a field from being cultivated at all, and a whole season's crop might be lost. These Mamlatdars were as well able to settle disputes regarding the possession of water as they were with regard to land, &c.; and the present Act, therefore, made it lawful for them to give immediate possession of the right to water from wells, tanks, canals or water-courses, or of the profits arising from the same.—(SEE THE PROCEEDINGS OF THE COUNCIL OF THE GOVERNMENT OF BOMBAY, VOL. XIV, p. 23.)

[*Bom. Act III of 1876—Not to create new Courts.*] The intention of Bombay Act III of 1876, as stated in the preamble, was not to abolish the old Mamlatdars' Courts and create new Courts under the same name, but was to bring into one consolidating and amending Act so much of the old law and such new law as appeared necessary for the continued regulation of the existing Courts.—*BAI JAMNA v. BAI JADAV, I. L. R. 4 Bom. 168; S. C. Prin. Judg. for 1879, p. 568.*

OBJECT OF THE ACT.

Under the former law, if the suit was brought within the prescribed period, even the rightful owner of the immoveable property was precluded from showing his title. The plain object of the law is to discourage proceedings calculated to lead to serious breaches of the peace, and to provide against the party who has taken the law into his own hands deriving any benefit thereby. The power of the Mamlatdar is just like the

power of a praetor under the Roman Civil Law (Phillimore on Jurisprudence, 219 ; Sandar's Instit., lib., IV., title XV., 6).

[*Cultivation of land—Breach of peace—Effect of Mamlatdar's decision.*] The purpose of this Act was temporary only, and chiefly to provide for the cultivation of the land and to prevent breaches of the peace until the Civil Court should determine the rights of the disputants. The decisions of the Revenue and the Mamlatdars' Courts as to possession and dispossession do not bind the Civil Courts, the proceedings in the former Courts being of a summary character. The Civil Courts alone can entertain the question of title.—**BASAPA v. LAKSHMAPA**, I. L. R. 1 Bom. 624 ; S. C. Prin. Judg. for 1877, p 58 ; **GANPATRAM JEBHAI v. RANCHHOD HARIBHAI**, I. L. R. 17 Bom. 645 ; S. C. Prin. Judg. for 1892, p. 389.

[*Object of the Act—Procedure.*] The jurisdiction of a Mamlatdar is of purely statutory creation, and for his power we must look solely to the terms of the statute under which he exercises them.—**GULABBHAI SHANKARJI v. KASANJI DAYABHAI**, Prin. Judg. for 1897, p. 246.

[*Bom. Act II of 1906—Necessity for the Act.*] In the case of **BAI JAMNA v. BAI JADAV**, (1879, I. L. R. 4 Bom. 168, at pp. 176 and 180) it was held that the jurisdiction of the Mamlatdars' Courts was not limited to agricultural lands or premises, but extended to towns and cities ; and in the case of **KAZI ISUB v. HUSAN SAHEB**, Prin. Judg. for 1894, p. 424, the question of possession of a MASJID was held to be within the Mamlatdar's jurisdiction. These decisions are contrary to the original objects and intention of the Act, and it was considered that possessory disputes arising in towns and cities could better be disposed of by the Civil Courts, either summarily under s. 9 of the Specific Relief Act, 1877 (I of 1877), or in ordinary suits. The same limitation should, it was thought, apply to disputes in regard to water.

A second important amendment to be effected was the saving of former owners or part-owners, and their representatives, from liability to the ejectment jurisdiction on determination of a tenancy or other right. This was proposed, because it had been found on

enquiry that the Bombay Act III of 1876 had largely been used virtually for collecting debts from mortgagors and debtors who accepted the nominal position of tenants in regard to their own property and bound themselves to pay heavy rents, and that much hardship had been caused in this way. As a further safeguard in the same direction it was thought proper to give power to the Mamlatdar to refuse to exercise his powers in cases of determination of tenancies and the like where he thought that such exercise would be inequitable or unduly harsh, or that the case would be more suitably dealt with by a Civil Court.

Frequent cases had occurred in which the exercise of the summary powers, given by the Bombay Act III of 1876, had been known to cause great hardship to agricultural tenants who were evicted, either at or before harvest time, without any compensation for the crops they might have raised on the land. The hardship was especially great in cases where the tenant, often ignorant and in debt to the landlord, had been under a belief or expectation that his tenancy would be renewed and had, in consequence of such impression, sown crops on the land. Such an impression might be mistaken and incapable of any legal justification, but the hardship was none the less real. The Bombay Act III of 1876 did not provide the Mamlatdar in such cases with any express power to deal equitably with growing or standing crops, so as to defer delivery of possession, either until compensation had been paid to the tenant or until the crop had been removed by him.

Besides these considerations, owing to defective language in the previous Acts, the Bombay Act III of 1876 was found in 1879 to extend to towns and cities. Consequently an over-whelming quantity of work had been thrown on the Mamlatdars.

To remedy these defects the Bombay Act II of 1906 was passed (a).

(a) See the Statement of Objects and Reasons published in the Bombay Government Gazette, dated 4th September 1905, Part VII, p. 520, *et seq.*

1. (1) This Act may be called the Mamlat-dars' Courts Act, 1906.
Short title (A).

(2) It shall extend to the whole of the Bombay Presidency (B), except the Local extent. City of Bombay (C) and Aden.

(A) "TITLE."

The title of a statute is an important part of the Act, and may be referred to for the purpose of ascertaining its general scope (a).

(B) "BOMBAY PRESIDENCY."

"*Bombay Presidency*" means the territories within British India for the time being under the administration of the Governor of Bombay in Council (b).

(C) "CITY OF BOMBAY."

"*City of Bombay*" means the area within the local limits for the time being of the ordinary original civil jurisdiction of the Bombay High Court of Judicature (c).

This Act is not expressed to come into operation on a particular day. Therefore it came into operation on the 29th October 1906, this being the day on which it was first published in the *Bombay Government Gazette* after having received the assent of the Governor-General on the 5th October 1906. Further this Act must be construed as coming into operation immediately on the expiration of the day preceding its commencement (d).

(a) Maxwell's Interpretation of Statutes, 4th Ed., p. 61.

(b) Bombay Act I of 1904, s. 3, cl. 7.

(c) Bombay Act I of 1904, s. 3, cl. 10.

(d) Bombay Act I of 1904, s. 5, and the *Bombay Government Gazette*, dated the 29th October 1906.

Repeal of Bom. III
of 1876.

**2. The Mamlatdars' Courts
Act, 1876, is hereby repealed.**

Where an Act expires or is repealed, it is, as regards its operative effect, considered, in the absence of provision to the contrary, as if it had never existed, except as to matters and transactions past and closed (a). The general principle of legislation is founded on the maxim *Nova constitutis futuris formum imponere debet non preterire*, i. e., a new law ought to be prospective, not retrospective, in its operations. Retrospective laws are, as a rule, of questionable policy, and contrary to the general principle that legislation, by which the conduct of mankind is to be regulated, ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law (b).

It is a general principle of law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require that construction. Except in special cases, a new Act ought to be so construed as to interfere, as little as possible, with vested rights; and where the words admit of another construction, they should not be so construed as to impose disabilities not existing at the passing of the Act (c).

A law, which merely alters the procedure, may, with perfect propriety, be made applicable to past as well as future transactions (d). The general principle is that alterations

(a) Maxwell's Interpretation of Statutes, 4th Ed., p. 623.

(b) Broom's Legal Maxims, 7th Ed., p. 24.

(c) Broom's Legal Maxims, 7th Ed., p. 25.

(d) Maxwell's Interpretation of Statutes, 4th Ed., p. 338; Macaulay's Hist Eng. Vol. III, 715; and Vol. V, 43. BUNGSHEE-DHUR DOSS v. MAHOMED KHULEEL, 1 Hay, 369; GUJERAT TRADING COMPANY v. TRIMBAKJI VELJI, 3 Bom. H. C. R., O. O., 45; RAMJI BOMANJI v. HORMASJI BARFORJI, 3 Bom. H. C. R., O. C., 49;

in the procedure are always retrospective, unless there be some good reason against it (a). But the new procedure would be presumably inapplicable, where its application would prejudice rights established under the old, or would involve a breach of faith between the parties (b).

The law, prevailing in the Bombay Presidency, as regards the effect of the repeal of an Act, is the same (c).

Now it is necessary to offer some remarks regarding cases, which were properly admitted and pending before a Mamlatdar under the Bombay Act III of 1876 at the time when the new Bombay Act II of 1906 came into force. For, it is important to know what effect is produced by the repeal of the Bombay Act III of 1876, and whether the proceedings held before the Mamlatdar under the repealed Act can be continued after the new Act came into operation or whether they expired with the Act. Parties to those proceedings may have incurred great loss of time, trouble and money, and perhaps the case may have been reserved simply for judgment, which was, in strictness, due before the Act and which the delay of the Court ought not to affect. It is presumed that the Legislature would not effect a measure of so much importance as the ouster or restriction of the jurisdiction of a Court without an explicit expression of its intention (d). The following remarks will show that the hardship in question had been in the contemplation of the Legislature and had been properly provided for, the Legislature

DOOLUBDAS PETTAMBERDAS v. RAMLOLL THACKOORSEYDASS, 5 Moore's I. A. 109; HAJRAT AKRAMNISSA BEGAM v. VALIULNISSA BEGAM, I. L. R. 18 Bom. 429; BALKRISHNA PANDHARINATH v. BAPU YESSAJI, I. L. R. 19 Bom. 204; GANGARAM v. PUNAMCHAND NATHURAM, I. L. R. 21 Bom. 822.

(a) Maxwell's Interpretation of Statutes, 4th Ed., p. 339.

(b) *Ibid.* p. 342.

(c) See Bombay Act I of 1904, s. 7.

(d) Maxwell's Interpretation of Statutes, 4th Ed., p. 199.

being fully aware of the maxim *salus populi suprema lex*, i. e., regard for the public welfare is the highest law (a).

Laws are of two kinds :—

I. *Substantive*, i. e., those laws which create rights.

For example, the law of contracts, torts, &c.

II. *Adjective*, i. e. those laws which enforce rights. For example, the Civil Procedure Code, &c. This is called the law of procedure.

Rights are generally founded on contract or in tort. The maxim of law is *ubi jus ibi remedium* (b), i. e., every right has a remedy. The ordinary remedy for enforcing a private right is contained in the Civil Procedure Code.

The Mamlatdars' Courts Act does not create any substantive right. It merely prescribes a *special* remedy or procedure for the enforcement of certain rights. It is entirely a law of procedure. It is not proper to say that it creates a *right to sue in a Mamlatdar's Court*. For the right to sue is not created by the Mamlatdars' Act, but by—

(1) A *breach of contract* e. g. a landlord's right to possession after the determination of tenancy.

(2) The *commission of a tortious act*, e. g., (a) dispossessing another of land &c. otherwise than by due course of law, (b) depriving another of the use of water otherwise than by due course of law, (c) obstructing or disturbing or attempting to obstruct or disturb the possession of land or the use of water otherwise than by due course of law, &c.

As regards the effect of the repeal of any Bombay Act,

(a) Wharton's Law Lex., 10th Ed., p. 680 ; Broom's Legal Maxims, 7th Ed., p. 1.

(b) *Ashby v. White*, 1 Smith's L. C. 231 ; Wharton's Law Lexicon, 10th Ed., p. 772 ; Broom's Legal Maxims, 7th Ed., p. 150.

Section 7, clause (b) of the Bombay General Clauses (Act I of 1904) says that when any Bombay Act repeals any enactment, then, unless a different intention appears, the repeal shall not affect the previous operation of that enactment or anything duly done or suffered thereunder. Consequently if, at the time when the Bombay Act II of 1906 came into force, anything was duly done under the former Act, for instance, if a plaint was presented under s. 5, or a notice was issued to the defendant under s. 11, or evidence was taken under s. 15, or a decision was passed under s. 15, or an order was issued to the village officers to execute the decision under s. 17, or if the village officers were proceeding to execute the decision by awarding possession to the plaintiff or to serve the injunction under s. 17, the new Act cannot affect these acts duly done under the old Act. If, when the new Act came into operation, no further act could be done to continue and complete the proceedings taken under the old Act, that would affect what was done under the old Act. The Legislature also have not expressed any intention that such proceedings duly taken under the old Act should not be continued. If the act duly done under the old Act is not to be affected, i. e., it is to be continued, what procedure will apply? Whether the procedure contained in the old Act or that in the new Act? Or should he be compelled to bring a regular suit?

Here it will not be proper to say that the plaintiff in a suit pending before a Mamlatdar may avail himself of the ordinary remedy by bringing a regular suit against his defendant in a Civil Court. If the parties are thus driven to a regular suit, it will violate other equally important maxims of law viz. *interest rei publici ut sit finis litium*, i. e., the interest of the public requires that there should be an end to litigation, and *nemo debet bis vexari pro undet et eadem causa*, i. e., no man shall be twice vexed for one and the same cause (a).

As regards the pending suits they may be divided into

(a) Broom's Legal Maxims, 7th Ed., p. 260.

two classes—(I) those which are cognisable under s. 5 of the new Act ; and (II) those which are not so cognisable, such as suits for the recovery of possession of lands, premises, &c. *not* used for agriculture or grazing, or suits for the restoration of water *not* used for agricultural purposes, &c.

The general principle is that alterations in the procedure are always retrospective, unless there be some good reason against it (a). The new Act contains a procedure which is evidently intended to apply to suits of the nature referred to in s. 5 of that Act. Consequently the procedure in the new Act would be inapplicable to such suits as are mentioned in s. 4 of the old Act but not mentioned in s. 5 of the new Act. But since the new Act came into operation, though a Mamlatdar has no jurisdiction to entertain and decide suits of the 1st class, his jurisdiction under s. 4 of the old Act still continues to exist for the limited purpose of continuing suits of the 2nd class, and therefore the procedure in the old Act must be applied to such suits.

When any Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed are, unless the contrary intention appears, to be construed as references to the provisions so re-enacted (b).

[*Repeal of Bombay Act III of 1876—Pending cases—Procedure.*] The plaintiff brought a suit on 25th October 1906 to recover possession of a house situated within the town limits of Kalyan. The new Mamlatdars' Courts Act (II of 1906) came into force on 29th October 1906. On 8th November 1906 the defendant objected that the jurisdiction of the Mamlatdar's Court had been ousted.

(a) Maxwell's Interpretation of Statutes, 4th Ed., p. 339 ; HAJRAT AKRAMNISSA BEGAM v. VALIULNISSA BEGAM, I. L. R. 18 Bom. 429 ; GANGARAM v. PUNAMCHAND, I. L. R. 21 Bom. 822.

(b) Maxwell's Interpretation of Statutes, 4th Ed., p. 628 ; Bombay Act I of 1904, s. 9.

The Mamlatdar came to a conclusion adverse to the defendant. The defendant applied to the High Court under s. 622 of the Civil Procedure Code on the ground that Bombay Act II of 1906 took away the Mamlatdar's jurisdiction over houses not falling within the description contained in s. 5 of that Act. The High Court passed the following:—

Judgment.—Clause (e) of s. 7 of the Bombay General Clauses Act (I of 1904) must be read as a whole and conditioned by the term "right." So read, if the opponent had no right to have recourse to the Mamlatdar's Court, this clause will not, any more than the preceding clause, help him. Maxwell says in his work on the Interpretation of Statutes (4th Ed., p. 338)—"No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being, by or for the Court in which he sues." The amended Act of 1906 did no more than bring about a slight change in procedure and in matters of this kind the plaintiff has no vested right which would bring his case within the provisions of s. 7 of the Bombay General Clauses Act.—*GULAM RASUL v. BALU SAYAJI*, 9 Bom. L. R. 527.

[*Possessory suit under Bom. Act III of 1876—Decision passed by Mamlatdar after Bom. Act II of 1906 came into force—Jurisdiction—Construction.*] On the 24th September 1906, a suit was brought in the Mamlatdar's Court at Dohad for possession of a certain house in the town. Decision was given on the 17th November 1906, and possession was given to the plaintiff on the 29th November 1906, after the Bombay Act II of 1906 came into force.

The defendant applied to the High Court under its extraordinary jurisdiction against the decision of the Mamlatdar.

RUSSELL Ag. C. J.—It will be seen by Bombay Act II of 1906 that the jurisdiction is limited to the cases of agricultural lands or premises. In the Statement of Objects and Reasons as to Bombay Act II of 1906 it is stated: "In the case of *BAI JANNA v. BAI JADAV*, I. L. R. 4 Bom. 161, at pp. 176 and 180, it was held that the jurisdiction of these Courts was not so limited but extended to towns and cities, and in *KAZI ISUH v. HUSAN SAHEB*, Prin. Judg. for 1894, p. 421, the question of possession of a

masjid was held to be within the jurisdiction. These decisions are contrary to the original object and intention of the Act, and it is considered that possessory disputes arising in towns and cities can better be disposed of by the Civil Courts, either summarily under section 9 of the Specific Relief Act, (I of 1877), or in ordinary suits. The same limitation should, it is thought, apply to disputes in regard to water. ”

The first clause of the head note to the case in 9 Bombay Law Reporter, 527, above referred to is incorrect. What the learned Judge says is : “On the face of it, it would appear that the Mamlatdar's jurisdiction has been taken away by the later Act, and great reliance has been placed on the well-established rule that enactments relating to procedure are to be given retrospective effect.” But the learned Judge held that the order of the Mamlatdar which related to a house situate within the town limits of Kalyan and which was passed after Act II of 1906 came into force was wrong and must be set aside. The reasoning of Mr. Justice Beaman in that case appears to us entirely correct. We cannot think that the plaintiff in the present case can be said to have any “right, privilege or obligation” to have his case finally decided in the Mamlatdar's Court within the meaning of those words in section 7 of the Bombay General Clauses Act I of 1904, which is identical with the corresponding section of the General Clauses Act X of 1897. No person, it is said, has any vested right in procedure, and, as stated by Sir Charles Sargent C. J. in *SHAMLAL v. HIRACHAND*, I. L. R. 10 Bom. 369, “jurisdiction is matter of procedure.” The question herein is purely one relating to the jurisdiction of the Mamlatdar's Court. After the 29th of October 1906, when the new Act received the sanction of the Governor-General it must, in our opinion, be held that the Mamlatdar's Court had no further jurisdiction with regard to houses in towns or cities or, in other words, the door of the Mamlatdar's Court after that date was shut to all cases relating to such houses.

REG. v. DENTON, 18 Q. B. 761, is very similar to the present case. The head note says as follows :—By Act of Parliament, the liability to repair certain highways in a parish was taken from the parish and cast upon certain townships in which the highways respectively were, and the Act gave a form of indictment against such

townships for non-repair, which would have been insufficient at common law. One of the townships was indicted under the Act, but, before trial, the Act was repealed without any reference to pending prosecutions. The Court arrested a judgment given against the township on such indictment.

We read the following passages from the judgment of Coleridge J. at page 771. The proceedings are before the Court, and are at a stage when the question arises whether a particular step can be justified. It can be justified only by an Act of Parliament; and that Act is repealed without any saving, then, can the Court for the present purpose take notice of the repealed Act? The answer is that what has been done and perfected cannot be disturbed; but, if you want the Statute for a further purpose as that of giving Judgment, you cannot have it." Erle J. says "the repealed Statute is, with regard to any further operation, as if it had never existed. It gave a form of proceeding which has been followed in this indictment; and the defendants were not liable except under the Statute. Between the indictment and judgment this Statute is repealed. To say that the proceedings may nevertheless be followed up contravenes the sense of the word 'repeal'."

We are of opinion, therefore, that the decree of Mamlatdar was wrong and must be reversed with costs.—VAJECHAND v. NANDRAM, 9 Bom. L. R. 1028.

3. In this Act, unless there is anything repugnant in the subject or context (A)

(a) the word "Mamlatdar" (B) shall include any Revenue-officer exercising for the time being (C) the powers of a Mamlatdar, of a Mukhtyarkar (D) or of a Mahalkari (E) and any other person (F) who may be specially authorized by the Governor in Council to exercise the powers of a Mamlatdar under this Act; and

(b) the words "plaintiff" and "defendant" shall include

- (i) a pleader duly appointed (G) to act on behalf of such plaintiff or defendant, and
- (ii) the recognized agent (H) of a plaintiff or defendant as defined in section 37 of the Code of Civil Procedure.

(A) "ANYTHING REPUGNANT IN THE SUBJECT OR CONTEXT."

For instance, the schedule A, given at the end of the Act, contains a form of notice to be issued to the defendant. In this form the word "defendant" does not include a pleader as mentioned in s. 3. Since the pleader of the defendant, if any, is not known, it is impossible to issue a notice to him.

(B) "MAMLATDAR."

The word "*Mamlatdar*" includes a Mahalkari in charge of a defined portion of a taluka and duly invested with the powers and duties of a Mamlatdar. See s. 13 of the Bombay Land Revenue Code, 1879, (Bombay Act V of 1879).

A Mamlatdar appointed under s. 12 of the Bombay Land Revenue Code, 1879, (*i. e.* Bombay Act V of 1879), is required to perform duties and exercise powers which are expressly imposed or conferred upon him by that Code, "or by any other law for the time being in force," which expression includes the Mamlatdars' Courts Act.

[*Mamlatdar—Kamavisdar.*] A Mamlatdar was formerly called a Kamavisdar.—MOTILAL VIRCHAND V. THE COLLECTOR OF AHMEDABAD, 8 Bom. L. R. 1904.

(C) "EXERCISING FOR THE TIME BEING."

These words are intended to cover the case of a subordi-

nate designated under s. 15 of the Bombay Land Revenue Code, 1879—a case which was not formerly included (*NINGAPPA V. DODAPA*, I. L. R. 21 Bom. 585 ; *DEORAO V. NARAYANDAS*, I. L. R. 25 Bom. 318 ; S. C. 2 Bom. L. R. 1106) (a).

(D) "MUKHTYARKAR."

The " Mukhtyarkar " in Sind corresponds to the " Mamlatdar " in the Presidency proper. Any revenue officer exercising for the time being the powers of a Mukhtyarkar is included in the word Mamlatdar.

(E) "MAHALKARI."

Mahalkaris are appointed by Collectors, who may, subject to the orders of Government and of the Commissioner, assign to them such of the duties and powers of a Mamlatdar as they may from time to time see fit (b). But under clause (a) of this section any Revenue officer exercising for the time being the powers of a Mahalkari is included in the word Mamlatdar.

(F) "ANY OTHER PERSON."

" *Any other person*," i. e. any person other than a Revenue officer.

The Right Honourable the Governor in Council is pleased to appoint the Superintendent of Mahabaleshwar, in the Satara Collectorate, a Deputy Collector under the provisions of Act XXI of 1852, and to invest him with the powers exercised by a Mamlatdar under Bombay Act V of 1864:—Notification dated 4th April 1871, Bombay Government Gazette, 1871, Part I, p. 424. This Notification, issued under Bombay Act V of 1864, was kept in force by Bombay Act III of 1876, s. 3. But now it appears that he must be specially authorized by the Governor in Council to exercise the powers of a Mamlatdar under the present Act.

(a) See the Bombay Government Gazette, dated 4th September 1905, Part VII, p. 521.

(b) The Bombay Land Revenue Code, 1879, s. 13.

[*The powers of Mamlatdar—Presumption—Burden of proof.*] In REX v. KERELST (3 Camp. 432) Lord Ellenborough ruled that the fact of a person acting in an office is sufficient *prima facie* evidence that he was duly appointed ; and added that it is a general presumption of law that a person acting in a public capacity is duly authorized so to do. Therefore the party, who avers that a Mamlatdar is not duly empowered has to produce evidence to rebut this presumption.—HARI LAKSHMAN ADHIKARI v. SHIVRAM BAHIRAV, Prin. Judg. for 1891, p. 342.

[*Absence of Mamlatdar—A Karkun in charge.*] A Karkun taking temporary charge of the office during the absence of the Mamlatdar on casual leave is not a Revenue Officer ordinarily exercising the powers of a Mamlatdar within the meaning of Sec. 3, Clause 1 of the Mamlatdars' Courts Act, 1876. He is an Officer exercising on an extraordinary occasion some such powers under the Bombay Land Revenue Code (Bombay Act V of 1879, Section 15). Therefore a decree passed by him in a possessory suit is a decree made by an unauthorized person purporting to exercise a jurisdiction which no competent authority had conferred upon him.—NINGAPA v. DODAPA, I. L. R. 21 Bom. 585 ; S. C. Prin. Judg. for 1896, p. 186.

Note.—But in the present section there are the words “exercising for the time being.”

[*Law to be observed by Mamlatdar—Opinions of law officers—Government Resolutions.*] In being guided by the opinions of law officers or the Resolutions of Government, the Mamlatdars must remember that in disposing of points of law which are likely to come before the High Court on revision, they must exercise their own judgments and that Government cannot authoritatively decide such questions for them.—See NANA BAYAJI v. PANDURANG VASUDEO, I. L. R. 9 Bom. 97 ; GOVINDA BABAJI v. NAIKU JOTI, I. L. R. 10 Bom. 78 ; BALA v. MAHADU, Prin. Judg. for 1898, p. 69 ; G. R. No. 3555, dated 8th June 1887, (Rev. Dep.) ; G. R. No. 7186, dated 22nd October 1887, (Rev. Dep.) ; G. R. No. 1809, dated 9th March 1888 (Pol. Dep.) ; and G. R. No. 1809, dated 7th May 1889, (Rev. Dep.)

[*Conflicting decisions of High Courts.*]—Where there are

different rulings on the same point by different High Courts, the Lower Courts are bound to follow the decisions of the High Court to which they are subordinate.—*ANANDAPA v. HANMANT GAWDA*, Prin. Judg. for 1884, p. 67. See also *MAHOMED HADY v. SWEK CHEANG AND COMPANY*, I. R. 25, Cal. 488.

(F) "PLEADER DULY APPOINTED."

A pleader shall not be allowed to act in any suit or proceeding until he has obtained from the party, and filed in Court, from a power of attorney (*vakalutnama*) according to the prescribed form appointing him pleader in the cause (a).

A party may appoint a pleader to do work for him. For the maxim of law is *qui facit per alium facit per se*, *i. e.*, he who does an act through another is deemed in law to do it himself (b). The operation of this maxim is, however, limited by another maxim *delegata potestas non potest delegari*, *i. e.*, a delegated authority cannot be redelegated. This principle is otherwise expressed, *vicarius non habet vicarium*, *i. e.*, one agent cannot lawfully appoint another to perform the duties of his agency. This rule applies to a pleader, because the authority given to a pleader involves a trust or discretion in the agent for the exercise of which he is selected. In such a case although the original agent remains responsible to the principal, the loss to the client may sometimes be irreparable. Therefore the practice of allowing a pleader, who is not employed by a party, to appear for another *pleader* who is duly employed by him seems to be contrary to general principle, law and public policy. A practice which is in contravention of the law, even if such practice be the practice of a High Court, cannot make lawful that which is unlawful; nor can a practice of a Court justify a Court in putting upon an Act of the Legislature a construction which is contrary to the plain wording of the Act (c).

(a) The Bombay Reg. II of 1827, s. 50.

(b) Broom's Legal Max., 7th Ed., p. 628.

(c) I. L. R. All.

Consequently a party who duly employs a pleader, if that pleader unauthorisedly asks another pleader to act for him, can undoubtedly sue him for damages.

[*Pleader duly appointed by a party to a suit cannot delegate his authority to another pleader—Ex parte decree.*] The applicant (defendant No. 2) was one of two defendants in a suit in the Court of Small Causes in Bombay. He and his co-defendant (defendant No. 1) appointed separate pleaders (K. and W.) to conduct their case. On the day of hearing the applicant was unavoidably unable to be present, and his pleader (K.) being also engaged elsewhere requested W., the pleader of the other defendant in the suit, to hold his brief and to conduct the case for both defendants. W. did so. A decree was passed against both defendants. The applicant subsequently applied to the Full Bench under s. 37 of the Presidency Small Cause Courts Act (XV of 1882) for a new trial on the ground that he had not been represented at the hearing and that the decree had been passed against him *ex parte*. The Full Court refused the application, holding that the applicant had been represented by a pleader, and that the decree against him was not *ex parte*. The applicant then applied to the High Court in the extraordinary jurisdiction (s. 622 of the Civil Procedure Code, Act XIV of 1882).

Held, discharging the order of the Full Court, that the decree against the applicant was an *ex parte* decree. K., who was the applicant's duly appointed pleader, could not delegate his authority to W., and as the applicant was not himself present, the decree was *ex parte*. W. was not the duly appointed pleader of the applicant and could not, therefore, represent him at the hearing : See s. 39 of the Civil Procedure Code (Act XIV of 1882). The High Court sent back the case to the Small Causes Court to deal with the application for a new trial on its merits.—**SHIVDAYAL RAMCHARAN v. KHETU GANGU**, I. L. R. 20 Bom. 293 ; S. C. Prin. Judg. for 1895, p. 67.

[*Pleader handing over his brief to another.*] The Rule of Court dated the 22nd May, 1883, and authorising legal practitioners in certain cases to appoint other legal practitioners

to hold their briefs and appear in their place, was passed to facilitate the work of the Court and for the convenience of the pleaders practising before it, and was fully within the powers conferred upon the High Court by s. 635 of the Civil Procedure Code.—*MATADIN v. GANGA BAI*, I. L. R. 9 All. 613.

[*Appointment by pleader of another pleader without client's authority—Reg. II of 1827, s. 54—High Court Civil Circular Orders, No. 18, cl. (i)—Proviso not ultra vires.*] A pleader of the Athni Court appointed another pleader to appear for him without the authorization of the client. The Subordinate Judge refused to recognise the appointment, and held that the party was not represented.

The District Judge of Belgaum thought that the Subordinate Judge was right and made a reference to the High Court under s. 617 of the Civil Procedure Code (Act XIV of 1882) in the following terms :—Section 54 of Reg. II of 1827 contains the statute law on the subject. According to that, there can be no doubt that the action of the pleader was illegal, and that the Subordinate Judge was right in refusing to recognise it. The difficulty arises out of the words of cl. (i) of section 18 of the High Court Circular Orders. The only judgment on the point is reported at p. 67 of the Printed Judgments, 1895, where the Judges of the High Court gave full effect to the provisions of the Legislature. Since the proviso in cl. (i) of section 18 of the Circular Orders practically overrides section 54 of the Regulation and can scarcely be held to be consistent with either the terms or the policy of that section, while it is difficult to show with what part of the Civil Procedure Code it is consistent, it may well be doubted whether the order is not *ultra vires*.

FARRAN, C. J. :—This reference directly raises the question as to the legality of the proviso to cl. 18 (i) of Chapter I of Circular Orders of this Court printed at page 11* of the publication

* *Editor's note.*—This reference is to page 11 of the High Court Civil Circular Orders published in 1889, which was in force when this decision was passed. But this rule in cl. (i) was subsequently modified and given in another form in cl. (h) of section

which directs that a pleader may appoint another pleader to appear on his behalf, and that in such case the hearing will proceed unless the Court see reason to the contrary. In *SHIVDAYAL v. KHETU GANGU*, (I. L. R. 20 Bom., 293) it was held by Sargent, C. J. and Fulton, J., that under the Civil Procedure Code a duly appointed pleader could not delegate to another pleader his authority to appear for his client in the Presidency Court of Small Causes so as to render the appearance of the latter an appearance for the client. The Civil Circular above referred to did not apply to the Small Cause Court, so that decision does not really touch the question now before us. The decision was based upon the principle that *potestas delegata non potest delegari* unless expressly or impliedly authorised by the Legislature, and that it was not so authorised. The Legislature could, there can be no doubt, vary that principle in connection with pleaders, and a rule duly made under legislative authority would have the same effect as if enacted by the Legislature itself. A similar rule was held to be a valid rule by the High Court of Allahabad in *MATADIN v. GANGA BAI* (I. L. R. 9 All. 613).

That rule, however, applies only to pleaders appearing in the High Court itself. It was made under section 635 of the Civil Procedure Code.

The power of the High Court to make general rules for the procedure and conduct of business in the Subordinate Courts is derived from Statute 24 and 25 Vict., C. 104, s. 15, and from s. 652 of the Civil Procedure Code. Under the former statute it is provided that such general rules shall not be inconsistent with the provisions of any law in force, and under the latter such rules must be consistent with the Civil Procedure Code itself.

The first question which has to be determined is whether the above rule is consistent with clause 1 of section 54 of Regulation II of 1827 which is a law still in force. It enacts that when a pleader is unable to attend the Court in consequence of indisposition or

18 at page 9 of the High Court Civil Circular Orders published in 1903, which fact clearly shows that the former rule was found objectionable. Even this rule is objectionable.

other necessary cause, he shall notify the same to the Court in writing, in which case proceedings in the suit shall be stayed * * * to enable the party to transfer by endorsement or otherwise his power of attorney (either temporarily or until the suit is determined) to another pleader. That enactment plainly does not authorise one pleader getting another pleader to hold his brief, but the question is whether a rule which gives that additional power to a pleader is inconsistent with it. Can the two stand together? The section is intended to prevent a client being prejudiced by the absence of his pleader. It does not appear to us to be inconsistent with that protection that a pleader should (still being himself responsible) request another pleader with the leave of the Court to appear for him. The legality of the rule does not appear to us to be affected by that enactment. The rule merely adds a proviso to the section which is not at variance with its general purport.

We must now consider whether the rule (i) can stand having regard to ss. 36 and 39 of the Code. Section 36 is an enabling section and (omitting reference to authorized agents with which we are not now concerned) enables any appearance, application or act which is required or authorized to be done by a party to be done by a pleader duly appointed to act in his behalf. Section 39 provides that the appointment of a pleader to make or do any appearance, application or act shall be in writing and filed in Court. The result is that a pleader whose appointment is in writing and filed in Court can appear for his client just as the client could do himself. We cannot see, as the Allahabad High Court could not see, anything inconsistent with that enactment in a rule which authorizes a pleader (without ceasing to be responsible to client) to ask another pleader to hold a brief for him. This is what the rule does by way of proviso to the section—" Provided that a pleader may appoint another pleader to appear in his behalf and in such case the hearing will proceed unless the Court see reason to the contrary." The section regulates the mode in which a party must appoint a pleader. The rule provides how in certain cases the pleader so appointed may with the leave of the Court transact the business with which he is so entrusted. The rule was passed to facilitate the work of the Court and to obviate the unnecessary postponement of cases, and is one which has, we believe, worked well. For many

years it has been in existence without objection being made to it.

As to the objections now made to it by the District Judge, they refer more to its possible abuse than to its legality. With reference to them it must be remarked that the rule is merely permissive with the leave of the Court. If a client objected†, the Court would doubtless see reason to the contrary, and so if it considered that the rule was being abused. It was certainly never intended to allow experienced pleaders to transact their client's business by the agency of inexperienced juniors, but only to avoid unnecessary adjournments in unimportant matters when the pleader engaged by the party is temporarily absent.—*IN RE SHIDAPPA, I. L.* R. 22 Bom. 654.

(G) "RECOGNISED AGENT."

The recognized agents defined in section 37 of the Code of Civil Procedure (Act XIV of 1882) are as follow:—

Section 37.

(a) "Persons holding general powers of attorney from parties not resident within the local limits of the jurisdiction of the Court of attorney from parties within which limits the appearance, application, or act is made or done, authorizing them to make and do

† *Editor's note.*—Generally a party who has duly appointed a pleader, is not present in Court on every day of hearing; for many suitors reside in villages in the district far from Court. Consequently he is not always in a position to know whether his case is conducted by his pleader or by somebody else *for* his pleader and whether that somebody is competent or otherwise.

Now the class of pleaders is too crowded. People run to old experienced pleaders, who having too much work have often times to run to different Courts situated at long distances in the same town or perhaps hundreds of miles away in different districts. The junior and inexperienced pleaders who are much after work, may take up the brief from the senior pleaders and may do irreparable harm to parties, who do not even know how or to whom to complain.

such appearances, applications, and acts on behalf of such parties;

(b) Mukhtyars duly certificated under any law for the time being in force, and holding special powers of attorney authorizing them to do, on behalf of their principals, such acts as may legally be done by mukhtyars.

(c) Persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application, or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts."

Persons carrying on trade or business for parties out of jurisdiction.

Persons appointed by Military men to prosecute or defend suits on their behalf under s. 465, Act XIV of 1882, are not recognized agents within the meaning of this Act.

There is a class of practitioners who practise in some of the Criminal Courts, and who also try to practise in the Mamlatdars' Courts, and who are known by the name of Mukhtyars. They are a class of men who are subject to no professional restrictions. In any case there is no guarantee either of professional qualifications, of social position, or of general character. Consequently cl. (b) of this section does not provide for the employment of such Mukhtyars, unless they are recognized agents. Hence a proceeding in which a Mukhtyar, who is not a recognized agent, is admitted, will be considered as tainted with illegality.

As to the meaning of other words and expressions used in this Act see the Bombay General Clauses Act I of 1904.

4. (1) The Governor in Council may, by notification in the *Bombay Government Gazette*, appoint in any taluka a Joint Mamlatdar (A)

Power to appoint Joint Mamlatdar.

under this Act, who shall be invested with co-extensive powers and a concurrent jurisdiction with the Mamlatdar, except that he shall dispose of such suits only as he may receive from the Mamlatdar.

(2) The Mamlatdar is hereby empowered to transfer to the Joint Mamlatdar for disposal any suit under this Act the plaint in which has been presented to the Mamlatdar under section 7, and to re-transfer to his own file any such suit, of which the Joint Mamlatdar is, owing to death, sickness or any other cause, unable to dispose.

(3) The Governor in Council may delegate his powers under sub-section (1) to the Commissioner (B).

This section is new.

(A) "A JOINT MAMLATDAR."

The power to appoint Joint Mamlatdars is considered necessary to meet cases where the work is too heavy for one man (a). It must be observed that the powers and the local jurisdiction of both the Mamlatdar and the Joint Mamlatdar must be the same, except that the latter has no power either to receive a plaint independently under s. 7 or to transfer the suit.

A Joint Mamlatdar has no independent power to receive a plaint under this Act. If the Mamlatdar receives it and transfers it to him, then only he can proceed with it. But it is not clear whether or not he is to have a separate establishment for himself. Generally a carkoon from the Mamlatdar's Court is sufficient for his purpose, all other work being done by the

(a) Bombay Act I of 1904, s. 3, cl. 13.

Mamlatdar's establishment. Unless the Joint Mamlatdar is unable to dispose of the suit, the Mamlatdar cannot retransfer it to his own file (sub-s. 2).

(B) "COMMISSIONER."

" *Commissioner* " means, in Sind, the Commissioner in Sind, and elsewhere the Commissioner of a division appointed under the Bombay Land Revenue Code, 1879, or any other law for the time being in force in this behalf (a).

5. (1) Every Mamlatdar shall preside over a Court, which shall be called a Mamlatdar's Court, and which shall, subject to the provisions of sections 6 and 26, have power (A), within such territorial limits (B) as may from time to time be fixed by the Governor in Council, to give immediate possession (C) of any lands or premises (D) used for agriculture or grazing, or trees (E), or crops (F), or fisheries (G), or to restore the use of water (H) from any well (I), tank (J), canal (K) or water-course, whether natural or artificial (L) used for agricultural purposes to any person (M) who has been dispossessed or deprived thereof otherwise than by due course of law (N), or who has become entitled to the possession or restoration thereof by reason of the determination of any tenancy or other right of any other person (O), not being a person who has been a former owner or part-owner (P) within a period of twelve years (Q) before the institution of the suit of the property or use claimed, or who is the legal representative of such former owner or part-owner :

(a) See the Bombay Government Gazette, dated 4th September, 1905, p. 521.

Provided that, if in any case the Mamlatdar considers it inequitable or unduly harsh to give possession of any such property or to restore any such use to a person who has become entitled thereto merely by reason of the determination of any such tenancy or other right, or if it appears to him that such case can be more suitably dealt with by a Civil Court, he may in his discretion refuse to exercise the power aforesaid, but shall record in writing (R) his reasons for such refusal.

(2) The said Court shall also, subject to the same provisions, have power within the said limits, when any person is otherwise than by due course of law disturbed or obstructed, or when an attempt has been made so to disturb or obstruct (S) any person, in the possession of any lands or premises used for agriculture or grazing, or trees, or crops, or fisheries, or in the use of water from any well, tank, canal or water-course, whether natural or artificial, used for agricultural purposes, or in the use of roads or customary ways thereto (T), to issue an injunction to the person causing (U), or who has attempted to cause, such disturbance or obstruction, requiring him to refrain from causing or attempting to cause any further such disturbance or obstruction.

(3) No suit shall be entertained by a Mamlat-
dar's Court unless it is brought within six months (V) from the date on which the cause of action arose (W).

Power to issue injunction.

Suits to be filed within six months.

(4) The cause of action shall be deemed to have arisen (X) on the date on which Cause of action. the dispossession, deprivation, or determination of tenancy or other right occurred ; or on which the disturbance or obstruction, or the attempted disturbance or obstruction, first commenced (Y).

Explanation (Z).—The exercise by a joint owner of any right which he has over the joint property is not a dispossession, or disturbance of possession, of the other joint owner or owners within the meaning of this section.

Illustration I.

A lets *B* his field to cultivate for a specific period of one or more years. *B* refuses to resign possession after the expiration of that period. *A* can sue for possession in the Mamladar's Court at any time within six months from the date of the expiration of the said period, unless *B* is a person who has been a former owner or part-owner within a period of twelve years before the institution of the suit of the property, or who is the legal representative of such former owner or part-owner.

Illustration II.

B is a yearly tenant of *A*, who gives him notice to vacate, as he is bound to do under section 84 of the Bombay Land Revenue Code, 1879, at least three months before the end of the then current year of tenancy. At the commencement of the next year *B* refuses to vacate. *A* can sue *B* in the Mamladar's Court at any time within six months from the commencement of that year, unless *B* is a person who has been a former owner or part-owner within a period of twelve years before the institution of the suit of the property, or who is the legal representative of such former owner or part-owner.

Illustration III.

A allows *B* the use of water from his well, or from his water-course, for a specific period, at the expiration of which *B* continues to take water from the well or water-course without *A*'s consent. *A* may sue *B* in the Mamlatdar's Court at any time within six months from the expiration of the said period to obtain an injunction to stop *B* from taking the water, unless *B* is a person who has been a former owner or part-owner within a period of twelve years before the institution of the suit of the use of the water, or who is the legal representative of such former owner or part-owner.

Illustration IV.

A and *B* hold lands adjacent to a पाट or फांस, or similar artificial water-course, which has hitherto been exclusively used by *B*. *A* draws water therefrom. *B* may sue in the Mamlatdar's Court, at any time within six months from the date on which *A* commences to take the water, for an injunction to prevent *A* from so doing.

Distinction between paragraph (1) and paragraph (2).

In order to understand thoroughly the distinction between paragraph (1) and paragraph (2) of this section it is necessary to bear in mind the following considerations:—

All the things mentioned in paragraph 1, viz., lands, premises, trees, crops, fisheries and water, which are the objects of immediate possession or use, are *corporeal*, i. e. tangible things, and are, therefore, capable of being possessed or used immediately.

I. As regards lands, &c., a man may be (1) an owner, or (2) not an owner, e. g. a mortgagee, a lessee, &c. He may be (1) in possession or (2) not in possession. Possession may be (1) *actual* i. e. physical or (2) *constructive* e. g. by a rent note.

If A is in possession, and B turn him out of possession, A is *dispossessed*, and is not *in* possession. When A is dispossessed, *i. e.* possession is taken from him, he is *out of*, *i. e.* not *in*, possession. Dispossession, therefore, presupposes possession in the person dispossessed.

When a person is dispossessed in a certain manner, paragraph 1 gives him a remedy to recover possession.

II. As regards water from a well &c., a person may be (1) an owner of the well &c., or (2) not an owner.

(1) If he is an owner, the right of ownership includes the lesser right of using the water, and he may be said to be in *use* of water.

(2) If he is not an owner, he may have a *use* of the water from a well &c., belonging to, or in the possession of, another. If A is actually using the water, he is *in* use of it. If B takes the use of the water from him, A is *deprived* of his use. Consequently deprivation of use presupposes the use of the water by the person deprived of it.

When a person is deprived of the use in a certain manner paragraph 1 gives him a remedy to have the use *restored* to him.

Now roads and customary ways to fields are *incorporeal* or intangible things. They are not capable of physical possession like land &c., or use like water. Consequently there can be no dispossession as in the case of land &c., or deprivation of use as in the case of water. Consequently paragraph 1 contains no provision with respect to it.

A person may enjoy the use of roads &c. (1) on the land of *another*, or (2) on his *own* land.

(1) If A enjoys the use of roads &c. on the land of B, and if A is prevented from the use of the road &c. altogether,

then this is an *obstruction*, and the remedy to remove the obstruction is contained in paragraph 2. If in this case there is no obstruction but only a disturbance, the remedy to remove it is also given in the same para.

(2) Every owner of land has as an owner the use of roads &c. on his *own* land, because the use of roads &c. is comprehended in his larger right of ownership. If, therefore, this use is enjoyed by another, the deprivation of the use in this case will amount to *obstruction* or *disturbance* to the *possession* of land, and if that is caused otherwise than by due course of law, the remedy for the owner is that provided for by paragraph 2.

The chief distinction between *dispossession* on the one hand and *obstruction* and *disturbance* on the other, is that in the former case possession is *lost* while in the latter case it is *not lost*.

Disturbance is the hindering or disquieting of a person in the lawful and peaceable enjoyment of his right (a). For example, throwing stones on to one's land, allowing cattle to stray on his land, trespassing on the land, placing stones in the way so as not to block it, &c.

Obstruction is any thing that stops or closes a way or channel (a). For example, blocking the entrance, erecting a dam in the water-course, &c.

Section 5 affords a remedy when a person is otherwise than by due course of law—

- (1) Dispossessed of his property.
- (2) Deprived of his use of water.
- (3) Obstructed in his possession or use.
- (4) Disturbed in his possession or use.
- (5) Threatened by an attempt to obstruct or to disturb.

(a) Webster's English Dictionary.

In case (1) by awarding possession.

„ „ (2) by restoring a use.

„ „ (3), (4) & (5) by an injunction.

Nothing can be more important than to bear in mind the following few hints, viz :—

A Mamlatdar has in no case under this Act anything to do with the *right* either of the plaintiff or of the defendant. He has simply to determine the issues of *fact* given in s. 19 *post*. As, however, some knowledge of the law of possession, tenancy and easements of way and water will be highly serviceable to him, these subjects are treated of concisely in their appropriate places.

This section shows that the object of creating the Mamlatdar's Court is to give "*immediate* possession, and section 18 shows that the plaintiff, if successful, is to be put into immediate possession which is to continue until the plaintiff is ousted by a decree of a Civil Court. Consequently a plaintiff must, in order to maintain a suit under this section, be in *physical* possession of the property before his alleged dispossession. Similarly a plaintiff must be in *actual* use of the water before he was deprived of it, otherwise he cannot invoke the aid of a Mamlatdar.

Lastly it must be remarked that the question regarding the determination of any tenancy can arise only in the case mentioned in the first para and not in the case of an injunction mentioned in the second para, and consequently the question whether the defendant was a former owner or part-owner of the property claimed within a period of twelve years before the suit, does not arise at all in the latter case, for the plaintiff himself is in possession of the property claimed.

(A) "WHICH SHALL * * * HAVE POWER."

The Mamlatdar has power to—

I. *Give immediate possession of any—*

(1) *Lands* used for agriculture or grazing.

(2) *Premises* used for agriculture.

- (3) *Trees.*
- (4) *Crops.*
- (5) *Fisheries.*

To the person—

- (1) *Dispossessed* otherwise than by due course of law.
- (2) Who has become entitled to the possession thereof by reason of—

- (a) The determination of any tenancy. } of any other person not being a former owner &c.
- (b) " " other right. }

II. *Restore the use of water from any—*

- (1) Well. } Whether natural or artificial, used for agricultural purposes.
- (2) Tank.
- (3) Canal.
- (4) Water-course.

To the person—

- (1) Who is deprived thereof otherwise than by due course of law.
- (2) Who has become entitled to the restoration thereof by reason of—

- (a) the determination of tenancy. } of any other person not being a former owner &c.
- (b) " " other right. }

III. *Issue an injunction to any person—*

- (1) Who *causes* disturbance or obstruction. } otherwise than by due course of law.
- (2) Who *attempts* to cause disturbance or obstruction. }

- (i) To the possession of any—

- (1) Lands used for agriculture or grazing.
- (2) Premises used for agriculture.
- (3) Trees.
- (4) Crops.
- (5) Fisheries.

- (ii) In the use of water, natural or artificial, from any—

(1) Well.
 (2) Tank.
 (3) Canal.
 (4) Water-course. } used for agricultural purposes.

(iii) In the use of—

(1) Roads to (1) to (5) in (i) and (1) to (4) in (ii).
 (2) Customary ways to do. do.

Suit in which Government or Officer of Government is a party.

See s. 25 *post* and the notes thereunder.

Suit against a Sirdar.

Section 3 of Regulation XXIX of 1827 prohibits Courts of civil justice from entertaining suits against certain persons of rank. If a suit can be brought against such persons in the Court of a Mamlatdar, the object of this provision will fail. There is, however, no authoritative ruling on this point.

Suit by or against a Mamlatdar as a private individual.

If a Mamlatdar, in his private capacity, dispossesses another of his immoveable property or is himself dispossessed of such property otherwise than in due course of law, he cannot bring a suit nor can he be sued under this Act in his own Court, for *nemo debet esse iudex in propria sua causa*, *i. e.* no one can be a judge in his own cause (a). The remedy in such cases is that he should bring a suit in his own Court under this Act and apply to the Collector under s. 6 *post* for the transfer of the suit, or he may bring a suit in the Court of a Subordinate

(a) See also VINAYAK CHINTAMAN TIKEKAR v. THE MUNICIPALITY OF BARSI, Prin. Judg. for 1897, p. 107; QUEEN v. BOIDONATH SINGH, 3 W. R. Cr. 29; ANONYMOUS, 3 W. R. Cr. 33; QUEEN v. BHOLANATH SEN, I. L. R. 2 Calc. 23; S. C. 25 W. R. Cr. 57; WOOD v. CORPORATION OF THE TOWN OF CALCUTTA, I. L. R. 7 Calc. 322; S. C. 9 Cal. L. R. 193; QUEEN-EMPERESS v. SAHADEV VALAD TUKARAM, I. L. R. 14 Bom. 572; GIRISH CHUNDER GHOSE v. QUEEN-EMPERESS, I. L. R. 20 Calc. 857; KASHINATH KHASGIVALA v. THE COLLECTOR OF POONA, I. L. R. 8 Bom. 553.

Judge under s. 9 of the Specific Relief Act (I of 1877), or a regular suit on the strength of title.

Suit by or against a relative, servant &c, of the Mamlatdar.

On the same principle a Mamlatdar cannot hear a suit in which any of the parties is his relative, servant or dependant, or in which the Mamlatdar is personally interested. In this case also the maxim above mentioned will apply and the same step should be taken for having the suit transferred to some other Mamlatdar. However to secure impartial decision of the case, the law should have provided that in such a case the Collector should hear and determine the suit himself.

[*Possessory suit—Mamlatdar acting in the management of the property under the orders of the Talukdari Settlement Officer—Disqualification of the Mamlatdar as a Judge.*] The facts of the case appear from the following judgment of the High Court :—

FULTON, J. :—The plaintiff is a minor under the guardianship of the Collector of Ahmedabad, who manages the estate through the Talukdari Settlement Officer, and the question which we have to determine is, whether the Mamlatdar, who acts in the management of the property under the orders of the Talukdari Settlement Officer, has such an interest in the plaintiff's affairs as to disqualify him from trying this case.

The subject is fully discussed in the case of *Loburi Domini v. The Assam Railway and Trading Company, Ld.* (I. L. R. 10 Cal. 915), which shows that where an officer of Government has in the course of his executive duties "formed an opinion upon a matter and has acted upon that opinion, or sought to give effect to it as an agent on behalf of a public body which has become a litigant party in a case," the law will presume an interest creating a bias sufficient to disqualify him as a judge. This principle, as remarked by Mr. Justice Field, does not rightly reflect any unworthy suspicion upon an individual judge, which it secures and upholds one of the great pillars of judicial purity. No judge can act in any matter in which he has any pecuniary interest—*Dimes v. The Proprietors of the*

GRAND JUNCTION CANAL (3 H. L. 759), nor where he has an interest, though not a pecuniary one, sufficient to create a real bias. Whenever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act.—QUEEN v. RAND (L. R., 1 Q. B., 230).

The circumstances constituting an interest from which a bias may be presumed, vary in such case. In the present case the Collector in his affidavit has stated that the Mamlatdar was simply a ministerial officer carrying out the orders of the Talukdari Settlement Officer who has been managing the minor's estate on behalf of the Collector, and that he was not connected with the management otherwise than as acting under the orders of the Talukdari Settlement Officer. But this affidavit is not sufficiently full to enable us to determine whether or not the Mamlatdar was interested in the management of this estate in such a way as to render it probable that he would have a bias in favour of the plaintiff; and before deciding this question we should like to know whether in his correspondence with the Talukdari Settlement Officer he was in the habit of expressing his opinion and advising generally on the management of the estate, and whether in this particular case he had made any recommendation as to the desirability or otherwise of taking proceedings against the defendants or against other tenants similarly situated. From the affidavit it appears that the suit was suggested by the mother of the minor and the talati of Rojka, but we desire to be informed whether or not the Mamlatdar was consulted on the subject, and must call on the Government Pleader to obtain a further affidavit on this point from the Collector or Talukdari Settlement Officer.

It was urged that this suit must be brought in this Mamlatdar's Court, as there was none other competent to entertain it. But the Subordinate Judge's Court had concurrent jurisdiction, and the mere fact that its procedure may not be so expeditious as the Mamlatdar's does not justify any argument founded on necessity.

With these remarks we must now adjourn the further hearing of this application for a month, in order to enable the Government Pleader to procure the necessary affidavit.

1894, August 28. FULTON, J.—The Government Pleader

states that the Collector is unable to make the affidavit called for, as he is not prepared to state that the Mamlatdar was on no occasion consulted about the management of this estate, and that it is quite possible and likely that he was consulted previous to the institution of the proceedings. The rule must, therefore, be made absolute and the decree must be set aside with costs in this Court.—ALOO NATHU v. GAGURHA DIPSANGJI, I. L. R. 19 Bom. 608 ; S. C. Prin. Judg. for 1894, p. 302.

[*Redemption suit—Title to redeem—Payment to mortgagee—Jurisdiction—“Or other right of any other person in respect thereof”—Construction of Statutes.*] The facts of this case appear from the following judgment of the High Court :—

WEST, J.—In the present case, the opponent sued in a Mamlatdar's Court for restoration to him of certain land on payment of the money stipulated for in a mortgage, of which the term (seven years) had recently been completed. The applicant (the mortgagee) resisted the suit, on the ground that the assessment had been raised by the Government, and that, in consequence, a new agreement had been entered into, under which a larger sum was payable than under the original mortgage.

The Mamlatdar ordered delivery of possession on payment of the sum due under the original mortgage, and the question for us is, whether he had jurisdiction in the case. It is urged for the opponent that the words in section 4 of Bombay Act III of 1876—“ by reason of the determination of any tenancy or other right of any other person in respect thereof”—are wide enough to embrace a case like the present, and, literally taken, no doubt they are. But the words of a statute, though to be given their grammatical sense are to be construed also with reference to the general purpose of the statute ; and we do not think that, in passing Bombay Act III. of 1876, the Legislature intended to give the Mamlatdars jurisdiction in suit arising out of disputed claims to redeem mortgages. Such a purpose, had it existed, would have been very distinctly expressed as being something entirely new, and contrary to the generally received notices of the proper functions and competence of revenue officers.

Again, the principle of “ *noscitur a sociis* ” is one of familiar application in the interpretation of statutes ; and “ other right ”

must, we think, be construed as "other right resembling a tenancy and coming to a termination as definite and clearly ascertainable as an ordinary tenancy." It would be an undue application of the words in such a context to make them give to the Mamlatdars a widely extended jurisdiction in cases of ejectment. The later general words must be taken in a sense congruous with the more specific ones which precede, not in a sense giving to them a range, which, had it been contemplated, would certainly have been the subject of express and detailed provisions. In a recent case—*HETTIHEWAGE SIMAN APPU v. THE QUEEN'S ADVOCATE* (L. R., 9 App. Ca., at p. 586)—it was said: "It does not follow that because the words are wide enough to include actions *ex delicto*, they must do so. They are not words adapted to confer a new right, or to establish a new kind of suit. They are only regulative of rights and proceedings already known, and they must be construed according to the state of things to which they clearly refer. They can, therefore, receive a full and sufficient meaning without extending them to actions *ex delicto*, but they cannot receive a full and sufficient meaning, indeed, it is difficult to assign them any substantial operation at all, unless they embrace actions *ex contractu*." A similar principle applies here. In Section 258 of the Civil Procedure Code the words "any Court" have been construed to mean only "any Civil Court."—*QUEEN EMPRESS v. BAPUJI DAYARAM* (I. L. R. 10 Bom. 288); and in *LION INSURANCE ASSOCIATION v. TUCKER* (L. R., 12 Q. B. Div., at p. 186), Sir J. BRETT, M. R., says: "It is not because the words of a statute or the words of any document read in one sense will cover the case that that is the right sense. Grammatically they may cover it; but whenever you have to construe a statute or document, you do not construe it according to the mere ordinary general meaning of the words but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used, unless there is something which obliges you to read them in a sense which is not their ordinary sense in the English language as so applied. That, I take it, is the cardinal rule." In the Vagrant Act, (5 Geo. IV, c. 83), sec. 3, "every person wandering abroad or placing himself or herself in any public place.....to beg or gather alone," was construed as meaning only persons making this their habit and mode of life.—*POINTON v. HILL* (L. R., 12 Q. B. Div., 306).

From these examples it is clear that the context and the purpose of an Act are important factors in determining the sense of particular words and giving them due effect. Here we think, the Mamlatdar had not jurisdiction, and reverse his order, but without costs.—*SHIDLINGAPA v. KARIBASAPA*, I. L. R. 11 Bom. 599; S. C. Prin. Judg. for 1887, p. 109.

[*Possession of mosque—Surplusage in Plaintiff—Jurisdiction.*] The question of possession of a mosque is one within the competence of a Mamlatdar to try under the first paragraph of s. 4 of Bom. Act III of 1876. Allegations in the plaint about disturbance of office and interference with one's alleged rights to conduct worship therein relate to matters outside the jurisdiction of a Mamlatdar and may be treated as surplusage.—*KAZI ISUB v. HUSAN SAHEB*, Prin. Judg. for 1894, p. 424.

* * * This decision was passed on a reference made by the Collector.

[*Sham proceedings—Decree for possession null and void—Suit for possession by third party entitled to possession—Jurisdiction.*] If a suit for possession in a Mamlatdar's Court is a mere sham and a device to defeat the rights of a third party, the decree passed in it would be null and void and might be altogether disregarded so far as the interest of such third party is concerned, and would be no bar to a subsequent suit for possession in the Mamlatdar's Court against both the parties to the first suit.—*OHHOTALAL NAROTAM v. KALA alias KABHAI ADA*, Prin. Judg. for 1897, p. 355.

(B) "WITHIN SUCH TERRITORIAL LIMITS."

[*Construction—Taluka—Towns—Jurisdiction—City of Ahmedabad—Daskroi Taluka.*] The jurisdiction of the Mamlatdars' Courts is to extend over such territorial limits as may from time to time be fixed by Governor in Council, and those territorial limits, as a matter of fact, correspond with the limits of the jurisdiction of the Mamlatdar *qua* Mamlatdar or Revenue Officer,—that is, with his taluka. Hence towns which are situated in a taluka are not exempt from the jurisdiction of the Court, unless they have been specially excluded from it.

It being not denied that the city of Ahmedabad is within the limits of the Daskroi Taluka, the jurisdiction of the Court of the Daskroi Mamlatdar extends over a house in the city of Ahmedabad.—*BAI JAMNA v. BAI JADAV*, I. L. R. 4 Bom. 168; S. C. Prin. Judg. for 1879, p. 568.

(C) "POSSESSION OF ANY LANDS."

The provisions of this section are similar to those of s. 9 of the Specific Relief Act (I of 1877), which re-enacted the provisions contained in s. 15 of Act XIV of 1859. IN DADA-BHAI NARSIDAS v. THE SUB-COLLECTOR OF BROACH, 7 Bom. H. C. R. A. C. J., 82, when comparing the Roman Civil Law with the provisions of s. 15, Act XIV of 1859, Melvill, J., observes that under the former a plaintiff could not obtain the *interdictum de vi* unless he had a juridical possession, that is to say, one founded in right. And he cites Cicero pro Casina, c. 32, "*Ne id quidem satis est, nisi docet ita se possedisse ut nec vi, nec clam, nec precario possederit.*" Thus, he continued, a mere trespasser could not have succeeded; nor could he, in my opinion, succeed under s. 15 of Act XIV of 1859. He never acquired what the law understands by possession, and cannot, therefore, have been dispossessed."—"This is, however, an *obitur dictum*. In the the same case, Lloyd, J., observed, "As regards the nature of the possession necessary to sustain an action under s. 15 of the Limitation Act [i. e., Act XIV of 1859], I do not think it expedient to go as far as my learned colleague. The question does not arise in the present suit, and it seems to me undesirable to express an opinion thereon till it comes directly before the Court." Then Melvill, J., admitted that the expression of his opinion was not authoritative. This opinion was afterwards adopted by Sargent, C. J., in AMIRUDIN v. MAHAMAD JAMAL, I. L. R. 15 Bom. 685 (a).

Now one may say that if this had been the intention of the Legislature, they would have qualified the word "possession" by the word "juridical" in s. 15 of Act XIV of 1859. This is not done even in the subsequent Bombay Act V of 1864, nor in the Bombay Act III of 1876, nor in the present Act. In the same case, Melvill, J., remarks that "the Mamlatdars, by whom such suits are ordinarily tried, have very vague and confused ideas of the law bearing on the subject; and I venture to think that it is not undesirable to make such remarks as though

(a) See also SEAGER v. HAKMA, 2 Bom. L. R. 493.

not authoritative, may induce those officers to understand more clearly what it is which they are called upon to decide." It must be presumed that these remarks were present in the mind of the Legislature when they framed the subsequent Acts. If they had accepted those remarks, they would certainly have used the expression "*juridical possession*" to remove the vague and confused ideas of law in the minds of the Mamlatdars. The Legislature generally frame an Act in such words as can be well understood by the people for whom it is made. In dealing with matters relating to the general public, statutes are presumed to use words in their popular sense ; *uti loquitur vulgus* (a). A corollary to the general rule for interpretation is that nothing is to be added or to be taken from a statute, unless there are similar adequate grounds to justify the inference that the Legislature intended something which it omitted to express (b). It is an elementary rule that construction is to be made of all the parts together, and not of one part only by itself ; for the true meaning of any passage is that which best harmonises with the subject and with every other passage of the statute (c). Section 19 lays down the issues to be tried. The issues are framed to give notice to the parties regarding the evidence which is relevant and which they have to produce. The issues in question contain the word "possession" only and not "juridical possession." Further s. 21 provides for awarding possession. Here also the term juridical does not appear. To give a construction contrary to, or different from that which the words import or can possibly import, is not to interpret law, but to make it ; and Judges are to remember that their office is *jus dicere*, not *jus dare* (d).

But on reflection it will appear that the word "possession" in this section must be construed to mean *legal* possession. Otherwise it will lead to injustice. If the word posses-

(a) Maxwell's Interpretation of Statutes, 4th Ed., p. 81.

(b) *Ib. d.* p. 18. (c) *Ibid.* p. 42.

(d) Maxwell's Interpretation of Statutes, 4th Ed., p. 7.

sion were to include *illegal* possession, that would afford protection to persons who acquire possession by committing offences or other wrongs. This could not have been the intention of the Legislature. A statute is the will of the Legislature, and the general and fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of them that made it. The object of all interpretation of it is to determine what intention is conveyed, either expressly or by implication, by the language used, so far as it is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it (a). Again the language and provisions of expired and repealed Acts on the same subject, and the construction which they have authoritatively received, are also to be taken into consideration ; for it is presumed that the Legislature uses the same language in the same sense, when dealing at different times with the same subject, and also that any change of language is some indication of a change of intention (b).

Legal possession implies a *right* to possession. This leads to the consideration of the phrase *juridical possession*, i. e. possession founded on *right*.

Doctrine of possession.

Various rights exist with respect to a material thing. For instance, with respect to a field there is the right to walk about the field, to till it, to allow others to till it, &c. All these rights are rights over the thing available against the world at large : *jura in re* and *in rem*. All the rights which a person can have over a thing are merged in one general right of ownership. Thus it will be seen that ownership consists of rights over things. If a person grant a right of way to a neighbour across his land, or if the neighbour has a right to graze his cattle on that person's land, the neighbour has a *jus in re aliena*, i. e. a right over another's land, and certain rights have been detached from that person's ownership and given to the neighbour.

(a) Maxwell's Interpretation of Statutes, 4th Ed., p. 1.

(b) *Ibid.* p. 53.

The distribution of rights detached from ownership which are found in use is very extensive. For instance, in regard to a piece of land one may have a right to till it, another to walk across it, a third a right to draw water from a well in it, a fourth a right to turn his cattle on it to graze, a fifth a right to take the rent of it, a sixth a right to hold it as security for a debt, and yet no one of these persons would be considered as the owner. So long as these rights are in the hands of other persons, they have a separate existence; but as soon as they get back into the hands of the person from whom they were derived, they merge in the general right of ownership. However numerous and extensive may be the detached rights, however insignificant may be the residue, it is the holder of the residuary right who is considered as the owner (a).

Possession originally expresses the simple notion of a physical capacity to deal with a thing as we like, to the exclusion of every one else. This physical condition is protected by ownership (b).

Possession in law is not only a physical condition protected by ownership, but is a right in itself. In advanced systems of law the right of possession is considered to be separate from the right of ownership. The possession which is a simple physical condition may be distinguished by the name *detention*. Law has laid down rules prescribing the mode in which the right to possession may be acquired or lost (c).

The legal consequences of possession are—(1) the acquisition of ownership by adverse possession or delivery; (2) in a dispute regarding possession burden of proof is thrown upon the person not in possession; (3) right to use force in defending possession; (4) the right of the possessor to use and enjoy the thing &c. (d).

(a) Markby's Elements of Law, 5th Ed., §§ 307 to 317

(b) Markby's Elements of Law, 5th Ed., § 348.

(c) *Ibid.* §§ 349 and 350. (d) *Ibid.* § 351.

Corporal contact is not the physical element which is involved in the conception of possession. It is rather the possibility of dealing with a thing as we like, and of excluding others (a).

Form of transfer.—Where positive law, in cases of certain transfers, prescribes a particular form or mode of delivering possession (as in ss. 264 and 319 of Act XIV of 1882), such formal delivery, as between the parties concerned, must be deemed equivalent to actual possession, even when the former possessor retains his control over the property. Such possession is sometimes spoken of as "symbolical or formal possession." It is possession because the law looks upon it as such (b).

Acquisition of possession of land.—Possession of land sold may be acquired if the buyer enters upon the land and the seller withdraws or signifies his assent, or if the purchaser stands near to the land and the seller points out the vacant land with a view to transfer possession, provided that in either case there is no opposition on the part of a third person (c).

Retention of possession of land.—When possession is once received, it is not necessary that the possessor should remain on or even near the land in order to retain possession. He will continue in possession, if he can reproduce the physical power of dealing with the land at any moment he wishes it (d).

Loss of possession of land.—The possession of immovables lasts so long as there is any physical control over them, and ceases when that physical control ceases. One does not lose possession of his house by filling it with his friends and servants, even if he should go away, and leave them there. But should

(a) Markby's Elements of law, 5th Ed., §§ 353 and 354.

(b) *Ibid.* § 353; JUGGOBUNDHU v. RAM CHANDRA, I. L. R. 5 Calc. 584; LOKESUR KOER v. PURGUN ROY, I. L. R. 7 Calc. 418; RUNJIT SINGH v. BUNWARI LAL SAHU, I. L. R. 10 Calc. 993; ROZA v. LAKSHMAN, Prin. Judg. for 1896, p. 230.

(c) Markby's Elements of Law, 5th Ed., §§ 355 and 356.

(d) *Ibid.* § 357.

they, on his return, refuse him admittance, declining upon some pretext to acknowledge his rights as owner, then, until he has ejected them, he has lost possession (a).

Mental element in conception of possession.—In order to constitute possession in a legal sense, there must exist, not only the physical power to deal with the thing as we like, and to exclude others, but also the *determination* to exercise that physical power on our own behalf (b).

Possession may be transferred by *change of mind only*. For example, I and my lodger occupy my house, I sell the house, pass a rent-note and continue to occupy ; here my lodger has the possession (c).

An intention to possess need not be *constantly* present in order to constitute possession (d).

An intention to abandon possession is to be inferred from surrounding circumstances. Sometimes it is necessary to ascertain the exact point of time when possession is lost. In the absence of evidence to the contrary it must be presumed that the date of the *first* indication of an intention to abandon, is the date of the *determination* to abandon possession. For example, a cultivator not cultivating the land for several years may be presumed to have determined to abandon possession on the first omission to cultivate (e).

A person can be in possession of a thing by his *representative*, provided the latter determines to allow him to exercise his control. For example, one may possess money in the pocket of his servant. Such possession is not fictitious but *real* (f).

When my representative determines to assume control on his own behalf, or to submit to the control of another than myself, my possession is gone (g).

(a) Markby's Elements of law, 5th Ed., § 366. (b) *Ibid.* § 364.

(c) *Ibid.* § 368.

(d) *Ibid.* § 369.

(e) *Ibid.* § 370.

(f) *Ibid.* §§ 371—373.

(g) *Ibid.* § 373.

Exception.—When some one intrudes upon the property of an absent owner, the possession of the owner does not cease (a).

If the representative assume control over a thing on behalf of the principal without his knowledge and if the principal afterwards assent to the act, this is sufficient to constitute the possession of the principal, provided the act of the representative be within the scope of his authority. The maxim of law is *Omnis ratihabitio retrotrahitur et mandato priori equiparatur*, i. e. a subsequent ratification has a retrospective effect, and is equivalent to a prior command (b).

It may appear that as possession requires a determination of the will, and as the law considers that infants and lunatics are incapable of making such determination, they are incapable of acquiring possession. It may also seem that as they cannot give their assent, they cannot acquire possession through the act of a representative. But the law is that the representative of an infant, that is the parent or guardian, and the representative of a lunatic, that is, his committee, can supply the mental deficiency of the persons whom they represent. Hence if the representative or his principal has the physical control over a thing and the former determines to exercise it, the possession is complete (c).

In order to constitute possession through a representative, three conditions must be fulfilled :—

- (1) The representative must have the *physical control* over the thing.
- (2) The representative must *determine* that this physical control shall be exercised on behalf of his principal.
- (3) The principal must *assent* to its being so exercised (d).

(a) Markby's Elements of Law, 5th Ed., § 373.

(b) Broom's Legal Max. 7th Ed., p. 656.

(c) Markby's Elements of law, 5th Ed., § 376.

(d) *Ibid.* § 378.

Derivative possession is the possession which one person has of the property of another (a).

N. B.—In the case of a representative, the legal possession is in the principal, the representative having merely the *detention*; while derivative possession is true legal possession (b.)

The question who has the legal possession is important in the following relations, viz.—principal and agent, lender and borrower, letter and hirer, pledgor and pledgee, mortgagor and mortgagee, and bailor and bailee.

It is a fundamental principle that only *one* person can be in possession of the *same* thing at the *same* time (c).

Possession of co-owners.—When there are several co-owners, each exercises his control over *every* part of the property, partly on his own behalf in respect of his own share and partly as representative of his co-owners in respect of their share. He has, therefore, the *detention of the whole*, but is in possession of his own *share* (d).

Reasons for protecting possession.—The motives which have induced the law to give protection to the fact of possession, whether of the fullest or of the derivative kind, are not far to seek. Some writers have, however, thought it necessary to discover a somewhat mysterious explanation of what might otherwise have appeared simple enough. 'The ground of this protection' says Savigny, 'and of this condition similar to a right, has to be ascertained. Now this ground lies in the connection between the above condition of fact and the party possessing, the inviolability of whose person extends to those sorts of disturbance by which the person might at the same time be interfered with ... The case occurs where the violence offered to the person disturbs or puts an end to possession. An independent right is not, in this case, violated, but some change is effected in the condition of the person to his prejudice; and if the injury, which consists in the violence against the person,

(a) Markby's Elements of Law, 5th Ed., § 380. (b) *Ibid.* § 382.

(c) *Ibid.* § 397. (d) *Ibid.* § 399.

is to be wholly effaced in all its consequences, this can only be effected by the restoration or protection of the *status quo*, to which the violence extended itself. The same view is also to be found in an English case (a). 'These rights of action', said the Court of Exchequer, 'are given in respect of the immediate and present violation of possession, independently of rights of property. They are an extension of that protection which the law throws around the person.'

The word possession is not defined in this Act, and this is likely to cause confusion in the minds of officers as well as parties in particular cases. The following notes, however, from English cases will be found useful in determining some cases :—

A landowner who accommodates a poor relation with a cottage and garden, does not necessarily part with the possession of the property occupied by such poor relation. His possession, such as it is, may be the possession of the landowner. If a landowner allows his gardener, or servant, or workman employed upon his estate, to live in a cottage thereon rent-free, the possession of the servant is the possession of the master, and the servant has no greater interest in the land than a coachman who occupies part of his master's coach-house, or sleeps over his master's stables. And if a landowner, from motives of kindness or charity, allows a dependant, relative or friend to occupy a cottage and land upon his estate, and the landowner, during such occupation, continue to exercise acts of ownership over the land so occupied; if he repairs the buildings, cuts down or plants trees, or causes drains to be made through the land, or quarries and carries away stone, all these acts of dominion exercised by him over his own property show that he has never parted with the possession of it, although he has allowed another person to occupy it (b).

Where it was proved that the plaintiff was tenant of cer-

(a) ROGERS v. SPENCE, 13 M. and W. 581.

(b) TURNER v. DEO, M. & W. 845; Addison on Torts, 2nd Ed., 262, 263.

tain rooms in the defendant's house, and that the defendant unlawfully locked the door and kept him out, it was held that there had been an actual entry by the defendant into the plaintiff's rooms so as to support an allegation that the defendant broke and entered the rooms of the plaintiff and expelled him therefrom (a).

Whenever a person has a lawful authority to enter lands for any purpose whatever, and he exceeds his authority by doing on the land what he had no right to do ; or by staying longer than he had a right to stay, he becomes a trespasser *ab initio* (b), and a suit may be maintained for disturbance of possession.

Proof of the possession of the key of a building is no proof of the possession of the building itself (c).

Where the plaintiff held some marsh-land under a tenant-for-life, so that his interest ceased on the death of the tenant for life, and at the time of the determination of the life-interest and down to the time of the commission of the trespass, and the commencement of the action the plaintiff had no servants or cattle, or anything upon the land to show that he continued in possession of it, it was held that there was no proof that he was possessed of the land (d).

Joint possession.

To make joint possession an exclusive one is disturbance of possession.

One tenant-in-common may sue his co-tenant-in-common for disturbance of possession by an act which destroys the sub-

(a) LANE v. DIXON, 3 C. B. 773.

(b) Com. Dig. *Trespass* (C). 2 ; Six Carpenters' case, Smiths' L. C. ; REED v. HARRISON, 2 W. Bl. 1218 ; AITKENHEAD v. BLADES, 5 Taunt. 197.

(c) REVETT v. BROWN, 5 Bing. 7.

(d) BROWN v. NOTLEY, 3 Exch, 221 ; 18 L. J., Exch, 39.

ject-matter of the tenancy-in-common, and which amounts in contemplation of law to an actual ouster (a).

[*Suit to be put in joint possession—Jurisdiction.*] The plaintiff sued in the Mamlatdar's Court to be put back in joint possession with defendant of a thikan, the joint property of the plaintiff and defendant, of which defendant held sole possession under a lease for a year which had just expired. The Mamlatdar passed an order declaring the plaintiff entitled to joint possession. On application to the High Court it was held that as the thikan was joint property and had never been divided, the plaintiff never had sole possession of half the thikan, and the Mamlatdar's Court could not award him sole possession of a half. Plaintiff being out of possession, all that he could sue for was either a decree declaring him entitled to joint possession with defendant of the whole thikan, or a partition decree awarding him separate possession of a specific half of the thikan. The Mamlatdar's Court, however, had no jurisdiction to make either the one decree or the other. The Mamlatdar's decree was therefore set aside leaving the plaintiff to seek his remedy in the Civil Court.—KESO DINKAR RANADE v. MONO SAKHARAM JOSHI, Prin. Judg. for 1883, p. 120. See also KRISHNA VALAD GOVIND v. GOPAL VALAD DADU, Prin. Judg. for 1890, p. 316.

[*Hindu family—Joint tenants—Obstruction by only one or more of the members—Disturbance of possession—Suit for injunction.*]

Judgment—As the authorities (see BABAJI BHIKAJI PINGLE v. GOPAL BIN RAGHU KULI, I. L. R. 3 Bom. 23 ; GUNI v. MORAN and DURGA v. JOY NASAIN I. L. R. 4 Calc., 96 ; and RADHA PROSHAD WASTI v. ESUF, I. L. R. 7 Calc., 414) show that some of the members of a Hindu family cannot, without the consent of the others, eject tenants, it follows that an obstruction by one or more of the members of the family, without the consent of the other member or members, such as preventing the tenant from enjoying the fruits of his tenancy, must be regarded as an illegal interference with the tenant's rights and the proper subject of an injunction. We must, therefore, reverse the decree of the Mamlatdar, and direct that an injunction issue against the defendants, with costs

(a) WILKINSON v. HAYGARTH, 12 Q. B. 815 ; Addison on Torts, 2nd Ed., 927.

on the defendants in the lower Court.—SHIDDAPA BIN CHENNAPA v. VISHNU DATTATRAYA BHANDARI, Prin. Judg. for 1893, p. 147.

[*Joint Hindu family—Obstruction to common door—Suit by one member for injunction.*] The plaintiff and defendant were members of a joint Hindu family. The plaintiff sued to recover joint possession with the defendant of the door of a certain house, and for an injunction against the defendant, who (he alleged) obstructed his use of the door. He alleged that he and the defendant were owners of the house in equal shares; and that the door was jointly used by both of them.

The defendant pleaded that the plaintiff was not entitled to an injunction, and that his remedy lay in a suit for partition.

On second appeal the High Court decided that assuming that the plaintiff was in possession and enjoyment of portion of the house before the door was closed, and that the only ingress to that portion was by the door, the closing of it would amount to ouster.—ANANT RAMRAO v. GOPAL BALVANT, I. L. R. 19 Bom. 269; S. C. Prin. Judg. for 1894, p. 111.

[*Decree of Civil Court for joint possession—Taking produce by a co-owner—Remedy as between joint owners.*] In execution of the decree obtained in 1886 in a Civil Court the plaintiff and the defendants were put into joint possession of certain land. The plaintiff subsequently brought this suit in the Mamlatdar's Court to recover possession of the said land, alleging that the defendants by taking cocoanuts from trees standing thereon had dispossessed him of the said land otherwise than by due course of law. The Mamlatdar held that the plaintiff had been thereby dispossessed, and passed a decree ordering the defendants to deliver up possession of the land to the plaintiff, together with the trees growing thereon. On an application under the extraordinary jurisdiction the High Court held, that the Mamlatdar had no jurisdiction to pass the decree. The Civil Court had passed a decree giving the parties joint possession of the land, and the Mamlatdar had no jurisdiction to override that decision and to place the plaintiff in exclusive possession. By the decree of the Civil Court they were determined to be joint owners, and the remedy in case of unequal possession or taking of produce was a suit for an account or for partition.—BHAU v. DADE

KRISHNAJI BHAGVI, I. L. R. 21 Bom. 77; S. C. Prin. Judg. for 1896, p. 196.

Evidence of possession.

The fact of possession as every other fact (excluding the contents of documents) may be proved by oral evidence (a). General and vague statements are, however, of no use. If the witnesses speak of the 'disputed land,' if they say that they saw plaintiffs 'in possession,' or that they saw them 'collecting rents,' then such statements are extremely general (b).

[*Acts of ownership.*] Possession is proved by acts of ownership, varying according to the nature of the property. It depends on mixed questions of law and fact. To constitute possession, the evidence should show specific acts of ownership, and those acts should show an exclusive exercise of dominion over the property (c).

Acts of ownership exercised on one portion of an estate are, as a rule, evidence of possession of the whole.—LORD ADVOCATE v. YOUNG, 12 Ap. Cas. 544.

[*Entry of name—Payment of Assessment.*] The fact that a person's name has been entered in the Government books, and that he has paid the Government assessment, though it may not be evidence of title, is very strong evidence of possession.—DEVAJI GAYAJI v. GODABHAI GADBHAJI, 2 Bom. H. C. R. 28.

[*Statement of witness.*] A statement by a witness that a party is in possession is in point of law admissible evidence of the

(a) The Indian Evidence Act (I of 1872), s. 59. MANI RAM DEB v. DEBI CHARAN DEB, 4 Beng. L. R., F. B., 97; S. C. 13 W. R. F. B. 42. See also ISHAN CHANDER BEHARA v. RAM LOCHUN, 9 W. R. 79.

(b) JOYTARA DASSEE v. MAHOMED MOHARUCK, I. L. R. 8 Calc. at 983 and 984.

(c) Collet on Specific Relief in India, 2nd Ed., p. 74; JONES v. WILLIAMS, 2 M. L. W. 320; LORD ADVOCATE v. LORD BLANTYRE, 4 Ap. Cas. 770; ISHAN CHUNDER BEHARA v. RAM LOCHUN BEHARA, 9 W. R. C. R. 79; JAGABANDHU DAS v. DINABANDHU DAS, 2 Beng. L. R. App. 30; SIVA SUBRAMANYA v. SECRETARY OF STATE, I. L. R. 9 Mad. 285.

fact that such party was in possession.—**MANIRAM DEB v. DEBI CHARAN DEB**, 4 Beng. L. R. F. B. 97; 13 W. R. F. B. 42. See also **ISHAN CHANDER BEHARA v. RAM LOCHUN**, 9 W. R. 79.

[*Jungle—Evidence of title—Presumption.*] In disputes as to the fact of possession of jungle or uncultivated lands it is only when neither party has exercised acts of ownership over such lands that the Court may resort to evidence of title, and presume that the party who has the title has also the possession.—**RAM BANDHU v. KUSU BHATHU**, 5 Cal. L. R. 481.

[*Survey proceedings.*] Survey proceedings are *prima facie* evidence of possession at the time of the survey; but they would give rise to no presumption of possession at a date a year later than they had been made.—**KUSSESSOR ROY v. JUGGODISHURI**, 7 C. L. R. 269.

[*Receipt of rent.*] Receipt of rent is good evidence of possession; but its non-collection on a particular portion of the property is no evidence that the possession of the property was disturbed.—**PUNDAR BINDOO MAHANTEE v. MOHESH CHUNDER SEN**, 20 W. R. C. R. 183; **ABDOOL ALI v. ABDOOL RUHMAN**, 21 W. R. 429.

[*Possession and actual user—Character of the land—Evidence of possession—Mode of enjoyment.*] Possession is not necessarily the same thing as actual user. The nature of the possession to be looked for and the evidence of its continuance must depend upon the character and condition of the land in dispute. Land is often either permanently or temporarily incapable of actual enjoyment in any of the customary modes as by residence or tillage or receipts of a settled rent. It may be incapable of any beneficial use, as in the case of land covered with sand by an inundation; it may produce some profit, but trifling in amount, and only of occasional occurrence as is often the case with jungle land. In such cases it would be unreasonable to look for the same evidence of possession as in the case of a house or a cultivated field. All that can be required is that the plaintiff should show such acts of ownership as are natural under the existing condition of the land, and in such cases when he has done this, his possession is presumed to continue as long as the state of the land remains unchanged, unless he is shown to have been dispossessed.

When lands, which have been in such a condition as to be incapable of enjoyment in the ordinary modes are reclaimed and brought under cultivation, the change is in many instances gradual and difficult of observation while in progress. Diluviated land may take years to reform. Jungle land is often brought under cultivation furtively by squatters clearing a patch here and a patch at irregular intervals of time. So that it may be a matter of extreme difficulty to prove as to any piece of land the exact date at which its condition became altered. And as the plaintiff is in the abscense of dispossesion presumed to continue in possession as long as the state of the land remains unchanged, it is essential to enquire on whom the burden of proof of the date of the change lies.—**THAKUR SING v. BHOGERAJ SINGH**, I. L. R. 27, Calc. 25 at 28.

[*Native families—Manager—Possession—Female members.*] In dealing with the question of possession as between brothers and sisters in native families regard must be had “to the conditions of life under which such families live” and to the fact that in such families the management of the property of the family is, by reason of the seclusion of the female members, ordinarily left in the hands of the male members. In the case of such families slight evidence of enjoyment of income arising from the property is sufficient *prima facie* proof of possession.—**INAYAT HUSEN v. ALI HUSEN**, I. L. R. 20 All. 182 at 185.

[*Receipts for revenue.*] Possession of receipts for Government revenue, though evidence of possession, does not prove it.—**LALLEE SINGH v. AMRIT KOOER**, 17, W. R. C. R. 490.

[*Purchase of land—Delivery of rent notes by tenants to purchaser—Obstruction by defendants to tenant of plaintiff—Suit for injunction—Jurisdiction.*] Plaintiff alleged that he purchased land from S and received delivery of rent notes passed to the vendor by his (vendor's) tenants, and that obstruction was caused to the plaintiff's tenant who was cultivating the field. He prayed for an injunction against the defendant not to cause obstruction. The Mamlatdar decided that the plaintiff be put in possession of the plaint land and the defendants be required not to further disturb him.

The defendant applied to the High Court.

Judgment.—The plaintiff never has had actual possession of the land. If he has a good title under his purchase from S, he must assert the same in the ordinary Civil Court.—RAMRAO SHANKAR v. SANTAN MARIAN FERNANDES, 2 Bom. L. R. 515.

[*Possessory suit—Mamlatdar—Act XIX of 1841—District Judge—Order—Possession vested in Nazir—Jurisdiction*] A Mamlatdar entertained and decided a possessory suit in plaintiff's favour, although the District Judge had, on defendant's motion, issued an order under Act XIX of 1841 respecting the same property, vesting its possession in the Nazir of the Court :—

Held, that it was not necessary to quash the order of the Mamlatdar on that ground alone, as the District Judge's order was apparently an interlocutory and temporary one. If the District Judge eventually confirmed the Nazir's possession, then the Mamlatdar's order was of no effect ; and if the District Judge considered that the defendant was not entitled to the protection under Act XIX of 1841, then the proceeding under that Act would come to an end and the Mamlatdar's order which would be in conformity with the District Judge's order would come into effect.—NARAYANDAS RATANSI v. JHAVERBAI KOM DAMODHAR, 2 Bom. L. R. 613.

(D) "Premises."

In law the term premises is applied to a building with its adjuncts (a).

[*Construction—Jurisdiction.*] The word 'premises' is used in its ordinary sense so as to include houses. And this view is apparently borne out by the case BAJI DEV v. SADASHIV BHAISHANKAR (5 Bom. H. C. Rep., A. C. J. 158), which shows that the Court has recognised the jurisdiction of Mamlatdar's Court in regard to houses.—BAI JAMNA v. BAI JADAV, I. L. R. 4 Bom. 168.

[*Inspection by Mamlatdar.*] It is not incumbent upon the Mamlatdar to go to inspect the premises, unless an application is made for that purpose.—(G. R. No. 4590, dated 26th August 1874.)

(E) "TREES."

The word "tree" is not defined in the General Clauses

(a) Webster's English Dictionary.

Act (X of 1897) nor in the Bombay General Clauses Act (I of 1904). The word must, therefore, be understood in its ordinary sense. It means a plant whose stem or stock is woody, branched and perennial, and above a certain size. Trees and shrubs differ only in size, and there is no absolute limit between them. When a plant of the above description is more than eight or ten feet high, and not climbing, it is generally called a *tree*. When it is less than this, it is called a *shrub*. But there are many exceptions to this on both sides (a).

From the wording of the section it is plain that a *Mamlatdar* will have jurisdiction to award the possession of trees, though they be situated within the limits of towns and cities.

[*Trees overhanging neighbour's land—Right to have branches of trees cut—Nuisance—Easements Act (V of 1882.)*] Plaintiff sued for an injunction restraining the defendant from allowing the branches of a tree belonging to him to overhang plaintiff's land, and for an order directing him to cut off the branches. Defendant pleaded that the branches of his tree had projected over plaintiff's land for forty years, and contended he had, therefore, acquired a prescriptive right of the nature of an easement over plaintiff's land. Held that the plaintiff was entitled to cut away the branches which overhang his land, though they had done so for more than forty years.—HARI KRISHNA JOSHI v. SHANKAR VITHAL, I. L. R. 19 Bom. 420.

(F) "CROPS."

The word "*crops*" means that which is gathered; the corn or fruits of the earth collected; harvest. The word includes every species of fruit or produce, gathered for man or beast. It also means corn and other cultivated plants while growing; *a popular use of the word* (a).

(G) "FISHERIES."

A fishery is a place for catching fish with nets or hooks on the seacoast or on the banks of rivers (b).

(a) Webster's English Dictionary.

The Rights of Fishery.

The right of fishing is a right which may exist either in connection with or independent of the ownership of the soil over which water flows. When this right is connected with the ownership of the soil, it is a right of property, one of the profits of the land, and has been called a *territorial fishery*. When it is independent of the ownership of the soil, it is either a common right, or it is a profit or easement over the soil of another founded on grant or prescription from the owner of the soil, or from the Crown (a).

It is not an easement, but a *profit à prendre* (b) in the soil of another, and cannot be claimed by prescription by the public, or by a large and indefinite class such as "owners and occupiers."

As such *profit à prendre*, a fishery may exist either in *gross*, or as appurtenant to a manor, and, in some cases, as appurtenant to a house or to land.

Fishery is of four kinds, viz :—

(1) *A common fishery.* This is a right which all the public have to fish in the sea and in tidal navigable rivers.

(2) *A several fishery.* This is a right of fishing in a particular place exclusive of all others. It exists *prima facie* in the owner of the soil of non-tidal waters. It may be enjoyed in non-tidal waters by a stranger by grant or prescription to the exclusion of the owner of the soil.

(3) *A free fishery.* This is a right of fishing in a particular place, not extensive, but co-extensive with the rights of others.

The main distinction between a several and a free fishery is, that the one is exclusive, and the other is not ; and that, in

(a) Coulson and Forbes on the Law of Waters, 2nd Ed., p. 337.

(b) *i. e.*, a right to enter on the land of another, and take therefrom a profit of the soil.—Wharton's Law Lexicon.

non-tidal water, a *several* fishery implies a right to the soil, while a *free* fishery does not. A *free* fishery may be claimed in gross or as appurtenant to land (a).

(4) A common fishery appears to be much the same as a *free* fishery, *i. e.*, a right not exclusive to fish in a particular place, and is often used in this sense, but it is generally used to express the right acquired by tenants of a manor to fish in the waters of the lord (b).

Fishery in Tidal Waters.

The right of fishing in the sea between high and low water mark, in tidal waters, in estuaries and arms of the sea, and in public navigable rivers, so far as the tide ebbs and flows, is *prima facie* vested in all the subjects of the realm.

Fishery in Private Streams.

The proprietors on either side of the river are presumed to be possessed of the bed and soil of it moietively to a supposed line in the middle, constituting their legal boundary, and being so possessed, have an exclusive right to the fishery in the water which flows above their respective territories. Where a man possesses land on both sides of the water, he has *prima facie* the sole right of fishing therein (c).

This right is a right of property, one of the profits of the land, and has been called a *territorial fishery*.

As this right, in the case of opposite proprietors, only extends *prima facie* to the middle line of the water, each can only fish, whether with rods or nets, up to that boundary; and if either casts his net or line beyond that boundary, he is liable to an action of trespass, unless he can prove a right to the whole fishery.

The rights of shooting and fowling, unless specially reserved in a lease, are vested in the occupier or tenant of the lands, and not in the landlord. In an ordinary lease of lands,

(a) Coulson and Forbes on the Law of Waters, 2nd Ed.,
p. 341.

(b) *Ibid.* 342. (c) *Ibid.* 362.

including waters or streams, the right of fishing is necessarily implied as part of the general right to the soil and water unless the lessor specially reserves it.

The presumption that the owner of the soil of the bed of a non-tidal river is also owner of an exclusive right of fishing therein, may be rebutted, but if not rebutted, it is the legal presumption.

The lord of a manor, being *prima facie* the owner of the waste lands of the manor, will be *prima facie* entitled to the right of fishing in the waters of the waste. If any one claims a right of fishery in another's water, the onus of proof is on him.

A free fishery may exist in private waters by grant or prescription from the owner of the soil. It is sometimes also called a common of fishery, and is a right of fishery not exclusive in a particular place and as such may exist in the owner of the soil in conjunction with a stranger, or in two or more strangers to the exclusion of the owner of the soil.

The erection of a weir or other engine obstructing the passage of fish, though not a public nuisance and indictable, is an interference with the rights of the owners of other fisheries, and is as such *prima facie* actionable as is also the enhancing and enlarging of existing weirs.

The pollution of the water of a stream, so as to render it unfit for fish to live in, is actionable and ground for the interference of the Court by injunction.

Fishery in Lakes and Pools.

With regard to the law as to fishery in small ponds or pools, included in one property or manor, there can be no doubt that the owner of the property or manor has *prima facie* the exclusive right to fish therein. Where the boundary of two properties passes along the pool, it is taken to coincide with the *medium filum* of the pool, and the fishery will follow this boundary line (a).

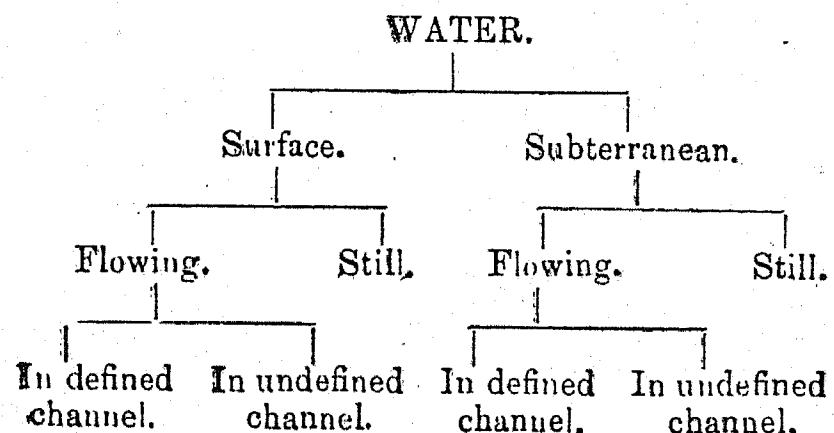
(a) Coulson and Forbes on the Law of Waters, 2nd Ed.,
p. 372.

The right of fishery in canals and artificial water-courses is incident *prima facie* to the ownership of the soil, as is the case in all other non-tidal waters, and it is clearly competent for the canal proprietors to let their right of fishery, if they should see fit.

An action will lie for the breaking and entering a several or a free fishery. The pollution of a river, which has the effect of killing or driving away fish, may be restrained by injunction. In a case where a man, by making an embankment and enclosing the bed of a river, shut out and prevented the tide from reaching a mussel bed and breeding ground, the Court granted an injunction to restrain this encroachment on the principle of irreparable damage to the fishery, without entering on or deciding the question as to the right of ownership in the soil (a).

(H) "THE USE OF WATER."

The divisions and subdivisions of water are as indicated below in a tabular form:—



Water is of two kinds:—

- (1) *Surface water*; e. g., Oceans, seas, rivers, lakes, ponds, springs, &c.
- (2) *Subterranean water*; e. g., water percolating under ground.

Surface water is of two kinds:—

- (1) *Flowing*; e. g., rivers, streams, &c.

(a) Coulson and Forbes on the Law of Waters, 2nd Ed., p. 643.

(2) *Still*; *e. g.*, oceans, seas, lakes, wells, &c.

Subterranean water is of two kinds :—

(1) *Flowing*; *e. g.*, water percolating through the strata of the earth.

(2) *Still*; *e. g.*, water confined within the earth.

Surface flowing water is of two kinds :—

(1) Flowing in *defined channel*; *e. g.*, rivers, water-courses, &c.

(2) Flowing in *undefined channel*; *e. g.*, water diffused or squandered on the surface of the earth.

Subterranean flowing water is of two kinds :—

(1) Flowing in *defined channel*; *e. g.*, water flowing in pipes under ground, &c.

(2) Flowing in *undefined channel*; *e. g.*, water percolating through various strata of the earth.

Again water is of two kinds :—(1) *Pure* and (2) *Polluted*.

A *water-course* is a body of water issuing *ex jure naturæ* from the earth, and by the same law pursuing a certain direction in a defined channel, till it forms a confluence with the sea.

A *spring* of water is a natural source of water, of a definite and well-marked extent.

A *stream* of water is water which runs in a defined course, so as to be capable of diversion.

A *river* is a running stream pent in on either side with walls and banks.

A *natural stream* is one which arises at its source from natural causes and flows in a natural channel (a).

An *artificial stream* is one that arises by the agency of man, or, though arising from natural causes, flows in a channel made by man (a).

A *pool* is a mere standing water with no current at all. It is a work of nature.

(a) Goddard on Easements, 4th Ed., p. 70.

A pond is a lake of small size. It is a work of art.

A subterranean stream may flow in such a known and defined channel as to give rise to similar rights as would exist above ground (a).

The principles which regulate the rights to water flowing in known and defined channels, whether upon or below the surface of the ground, do not apply to water, whether under or above ground, having no certain course or defined limits, such as that merely percolating through the strata of the earth, or that diffused over its surface, such water not being subject to the law of water-courses.

A stream begins at the point where the water palpably rises to the surface and forms a channel and extends till it mingles with the sea.

It is not, however, necessary to constitute a watercourse that the water should flow continually, as a channel may be occasionally dry.

Every water-course consists of :—(1) the bed; (2) the bank or shore and (3) the water.

The right to the use of the water of a water-course does not arise from the ownership of the soil thereof, but from the right of access thereto.

Natural Rights and Duties of Riparian Owners.

The word 'riparian' is relative to the bank. The expression 'riparian land' means land which abuts on a stream either natural or artificial. *Riparian Proprietors* are owners of lands bounded by a river or a water-course. *Riparian rights* are the natural rights which a riparian proprietor has as such. They are distinguished from easements acquired by prescription, or grant, express or implied. (b)

(a) Coulson and Forbes on the Law of Waters, 2nd Ed., p. 58.

(b) *Ibid.* p. 112 *et seq.*

Riparian rights only exist as to waters flowing in a *defined* channel. They may exist on the banks of tidal navigable rivers as well as on non-navigable streams, save where controlled by the public right of navigation. It is necessary for the existence of such riparian rights that the land should be in contact with the flow of the stream.

All persons having lands on the margin of a flowing stream have, by nature, certain rights to use the water of that stream, whether they exercise those rights or not; and they may begin to exercise them when they will.

The rights of a riparian proprietor, with respect to a stream, are limited only by those of persons in a similar or analogous position with himself.

The rights of the riparian proprietors on the banks of a natural water-course are corporeal; while those on the banks of an artificial water-course are incorporeal, *i. e.*, they are easements (a). These latter are dependant on the words of the grant or on the nature of the user.

The right to the enjoyment of a natural stream of water on the surface *ex jure naturæ* belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself. He has the right to have it come to him, in its natural state, in flow, quantity and quality, and to go from him without obstruction.

Flowing water is *publici iuris* not in the sense that it is *bonum vacans* to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only that all may reasonably use it who have a right of access to it, and that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession and that during the time of his possession only.

Any unauthorized interference with or use of the water

(a) For the definition of "*Easement*" see the Indian Easements Act (V of 1882), s. 4.

to the prejudice of one entitled to its use, is the subject of an action for damage, and may be restrained by injunction.

Prima facie, every proprietor of land along the margin of a river or stream of running water above tide water is the proprietor of the land covered by the water up to the middle thread of the stream. If the same person be the owner of the land on both sides of the river, he owns the bed of the whole river to the extent of the length of his land upon it, and as owner of this land, he has all the rights of a landowner (a).

If from any cause the course of the stream should be permanently diverted, the proprietors on either side of the old channel have a right to use the soil of the *alveus* (b), each of them up to what was the *medium flum aquæ* in the same way as they are entitled to use the adjoining land; but no riparian proprietor is entitled to use his property in the *alveus* in such a manner as to interfere with the natural flow of the stream or to cause an injury to the proprietary rights of any other riparian proprietor.

A proprietor of land upon the banks of a river or stream of running water has no property in the water, but has merely a usufructuary interest in the water, as appurtenant to his land. He is entitled to the comfort, enjoyment and benefit of the water in its natural state, as it flows past his land, as he is to all the other advantages belonging to the land of which he is owner. The right in no way depends upon prescription or presumed grant. It is a natural right, incident to the ownership or possession of adjacent soil.

The right to the enjoyment of the stream in its natural state in flow, quantity and quality, being a right, to which every proprietor of land on the banks of a river or stream of running water is of common right equally entitled, each proprietor is bound so to use the common right as not essentially to prevent or interfere with an equally beneficial enjoyment of

(a) Kerr on Injunction, 3rd Ed., p. 236 *et seq.*

(b) *Alveus* is the bed of a river.

it by all the other proprietors. No proprietor has a right to use the water to the prejudice of his neighbour above or below him, unless he has a title to some exclusive enjoyment. A certain diminution in the quantity of the water, or an acceleration or retardation of the flow, is generally an implied element in the right of issuing the stream at all, but the maxim of law is "*Deninimis non curat lex, i.e.*, the law does not concern itself about trifles (a), and unless the use be such as to affect materially the adjoining proprietor, a right of action will not arise (b).

The right to water in its natural quantity.

Every riparian proprietor has a right to the ordinary use of the water flowing past his land, for instance, to the reasonable use of the water for his domestic purposes and for his cattle. The expression 'domestic purposes' includes the purposes of cleansing and washing, feeding and supplying the ordinary quantity of cattle, and so on.

But every riparian proprietor has also a right to the *extraordinary* use of it, provided he does not interfere with the rights of other proprietors either above or below. Such extraordinary use must, however, be a reasonable use. If an unreasonable use is made of the water by any riparian proprietor, the others are entitled to have it restrained by an injunction.

A riparian owner may pen back and divert temporarily the waters of a stream flowing through his lands in a reasonable way, and for reasonable purposes connected with his tenement, provided he does not thereby injure his neighbours, and no action will lie unless there is proof of actual damage.

Whether a riparian proprietor may use the water of a stream for the purposes of irrigation, depends on the circumstances of each particular case (c).

A riparian owner on a natural stream, who has, without

(a) Broom's Leg. Max., 7th Ed., p. 115.

(b) Kerr on Injunctions, 3rd Ed., p. 238.

(c) EMERY v. OWEN, 6 Ex. 353.

infringing the rights of the other riparian owners, diverted for the purposes of his mill a portion of the water by means of an artificial means, does not from the fact that the means is artificial, lose his natural rights with regard to the water so supplied, but may maintain an action for diversion or pollution of the stream, his rights with regard to the water are infringed.

Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief thereby accrues to his neighbour, he will not be liable for damages; but where for his own convenience he diverts or interferes with the course of a stream, or where he brings upon his land water which would not naturally have come upon it, even though in so doing he act without wilfulness or negligence, he will be liable for all direct and proximate damages, unless he can show that the escape of the water was caused by an agent beyond his control, or by a stream, which amounts to *vis major* or the act of God. An act of God is no excuse where there is negligence.

A riparian owner on inland waters has an ordinary right *prima facie* to protect his land from the inroads of flood water, provided he can do so without injury to others.

The flood is a common enemy against which every man has a right to defend himself. If the law were otherwise, it would be mischievous.

The right to water in its natural quality.

A riparian proprietor on a natural stream has a right to the flow of the stream through or by his land in its natural state as an incident to the land through or by which it flows, and if the water be polluted, so as to occasion danger in law, though not in fact, it gives him a good cause of action, unless a right to pollute the stream has been acquired by the person causing the pollution, by long enjoyment or grant. Pollution is, therefore, actionable without proof of actual injury, and the fact that the stream is also fouled by others is no defence (a).

(a) Coulson and Forbes on the Law of Waters, 2nd Ed.,
p. 159.

The pollution of water is in itself an unlawful act and a nuisance, and differs in this respect from the diversion or obstruction of a stream. Therefore where a man, by an artificial channel or otherwise, discharges directly on to his neighbour's premises polluted water to his injury, he is liable to an action for nuisance.

Though neither the owner of land on an artificial water-course which is not a branch or division of a natural stream, nor the grantee or licensee of a riparian owner, can sue a higher riparian owner for polluting the water in the natural stream, a non-riparian owner who has legally appropriated part of the water is not debarred by the fact that he had no property in the water from suing a wrong-doer who discharges foul water directly upon his premises (a).

Where an action for damages by a riparian owner lies for pollution of a stream, the Court will interfere by injunction to restrain the nuisance, even where no actual damage is proved, to prevent the inconvenience of repeated actions for damages.

Where the plaintiff has proved a right to an injunction, it is no part of the duty of the Court to inquire how the defendant can best remove the nuisance.

The Court will not interfere by injunction in the case of merely prospective injury; the nuisance must be actual and existing. If, however, some degree of present nuisance exists, the Court will take into account its probable continuance and increase.

To determine whether there is pollution, it is necessary to consider the size and character of the stream, the uses to which it can be or is applied, the nature and importance of the use claimed and exercised by one party, as well as the inconvenience or injury to the other party.

(a) BALLARD v. TOMLINSON, L. R. 29 Ch. D. 115. See Goddard on Easements, p. 97.

Percolating water and water having no defined course.

The principles of law which regulate the rights of owners of land in respect of water flowing in known and defined channels, whether upon or below the surface of the ground, do *not* apply to water which runs in *no* defined channel, or merely percolates through the strata (a).

No action lies for the *abstraction* or *diversion* of water which runs in *undefined* channel or merely percolates through the strata ; for here there is *damnum absque injuria*.

The owner of land has an unqualified right to drain it for agricultural purposes in order to get rid of mere surface water, the supply of the water being casual and its flow following no regular or definite course ; and a neighbouring proprietor cannot complain that he is thereby deprived of such water which otherwise would have come to his land (b).

The owner of land containing underground water which percolates by *undefined* channels and flows to the land of a neighbour, has the right to divert or appropriate the percolating water within his own land so as to deprive his neighbour of it ; and his right is the same whatever his motive may be, whether *bonâ fide* to improve his own land or maliciously to injure his neighbour, or to induce his neighbour to buy him out. The only remedy of the owner of a well, from which such water has been abstracted, is to sink the well deeper and lay his neighbour's well dry (c).

Where defendant sold to plaintiff a well, and the right of conveying water therefrom through defendant's land without interruption or disturbance, it was held that defendant had only conveyed the flow of the water after it had risen in the well,

(a) Coulson and Forbes on the Law of Waters, 2nd Ed., p. 188 ; Broom's Legal Max. 7th Ed., p. 291.

(b) RAWSTRON v. TAYLOR, 11 Exch 353.

(c) ACTON v. BLUNDELL, 12 M. & W. 324 ; CHASEMORE v. RICHARDS, 7 H. L. 349.

and that action would lie for the interception of percolating water before it reached the well (a).

Where water which has actually percolated into, and is in a well, has been abstracted by operations in the adjoining land, no action will lie. The only remedy of the owner of a well, from which such water has been abstracted, is to sink the well deeper (b).

Although a landowner will not, in general, be restrained from drawing off the subterranean waters in the adjoining land, yet he will be restrained, if, in so doing, he draws off water flowing in a defined surface channel through the adjoining land. If one cannot get at the underground water without touching the water in a defined channel, he cannot get it at all (a).

Although no action will lie for the diversion or abstraction of percolating water, the law is otherwise with regard to its pollution. The maxim of law is *Sic utere tuo ut alienum non laedas*, i. e. enjoy your own property in such a manner as not to injure that of another person (c).

An injunction may be granted to restrain the defendant from deepening his cesspool, so as to cause polluting matter to percolate through the soil, and foul the plaintiff's well. If a man puts filth or poisonous matter on his land, he must take care that it does not escape so as to poison water which his neighbour has a right to use (d).

Remedy for the infringement of rights of water.

All infringements of rights of water, natural or acquired come under one of two classes—(1) *Trespass*, or (2) *Nuisance*. Where the act complained of is a wrongful disturbance of another in the exclusive possession of property, it is a trespass ;

(a) BRAIN v. MARFELL, 41 L. T., N. S., 455.

(b) NEW RIVER CO. v. JOHNSON, 2 E.L. & B.L. 435.

(c) Broom's Legal Maxims, 7th Ed., p. 281.

(d) WOMERSLEY v. CHURCH, 17 L. T., N. S. 190; BAL-
LARD v. TOMLINSON, L. R. 29 Ch. D. 115.

where the infringement of the right is the consequence of an act, which is not in itself an invasion of property, the cause from which the injury flows is termed a *nuisance*. For example, a person who digs a channel or erects a dam on his own land, does what is lawful, but if the effect of this act is to direct the water from a natural water-course to the loss of a riparian owner below or to turn it back to the injury of a riparian owner above, such act amounts to nuisance. If a man treads down grass in a neighbour's field, this is trespass.

Of acquired rights of water, and the easement of water-course.

In addition to the natural right to receive flowing water in its accustomed course, rights, the objects of which are to interfere with the natural course of the stream, may be acquired over a stream flowing through a man's land or through his neighbour's land. For instance, a right to throw back the water upon the land of proprietors higher up the stream; a right to discharge water upon the land lying lower down; &c. Such acquired rights are termed *easements*.

The land for the beneficial enjoyment of which the right exists, is called the *dominant tenement*, and the owner or occupier thereof *dominant owner*; the land on which the liability is imposed is called the *servient tenement*, and the owner or occupier thereof the *servient owner* (a).

The Indian Easements Act (V of 1882), only declares the existing law as to easements over water (b). *Easements in water* are *restrictions of natural rights in water*.

The natural rights of an owner of land in respect of water are set out in illustrations (f) to (j) to section 7 of the Indian Easements Act, V of 1882, which are as follow :—

"(f) The right of every owner of land that, within his own limits, the water which naturally passes or percolates by,

(a) See the Indian Easements Act (V of 1882), s. 4.

(b) PERUMAL v. RAMASAMI, I. L. R. 11 Mad. 16.

over or through his land, shall not, before so passing or percolating, be unreasonably polluted by other persons.

"(g) The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel.

"(h) The right of every owner of land that the water of every natural stream which passes by, through or over his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature.

"(i) The right of every owner of upper land that water naturally rising in, or falling on, such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land to run naturally thereto.

"(j) The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking household purposes and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land, and for the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners."

The rights of a riparian owner are—(1) a right to non-pollution; (2) a right to an unobstructed and undiminished flow; (3) a right to use and consumption consistent with the lower riparian owners' rights.

The easements relating to water may be classified thus:—

1. The right to affect or use the water of a natural stream in any manner *not* justified by natural right—

- (1) In quantity;
- (2) In quality.

2. The right to *conduct* water across a neighbour's land by an artificial water-course, and to go on his land for the purposes of clearing it.

(3) The right to *discharge* water or other matter on a neighbour's land.

(4) The right to go on a neighbour's land to draw water from a well.

Acquisition of easements.

The rights described above arise from—

I. *Express* contract (a).

II. Contract *implied* from—

(1) The relation of the parties when they became possessed of their tenements, or

(2) The long continued exercise of the right by the parties.

III. The provisions of a statute.

I. An easement is intangible property. The transfer of such property can be made only by a registered instrument (b).

Where the owner of a servient tenement has by express consent, or by such acquiescence as would make it a fraud to insist upon the legal right, induced others to incur expense in the execution of permanent works or the like, a Court of Justice, administering equity, will, in many cases, restrain him from the benefit of this rule (c).

(a) See the Indian Easements Act (V of 1882), s. 20.

(b) See s. 54 of the Transfer of Property Act (IV of 1882).

(c) Section 115 of the Indian Evidence Act (I of 1872).

DANN v. SPURRIER, 7 Ves. 235; RAMSDEN v. DYSON, L. R. 1 H. L. 140; DUKE OF DEVONSHIRE v. EGLIN, 14 Beav. 530.

A parol licence has, moreover, been held to be sufficient to extinguish an existing easement, as where permission is given to a man to erect something on his own land which is incompatible with the continuance of some easement over it (a).

An easement may be granted either separately and apart from the dominant tenement, or it may be included in the conveyance of it, by the use of such words as "all waters and water-courses used, occupied, or enjoyed with the premises."

The benefits of the right to an easement run with the land, and consequently upon a grant or covenant conferring an easement, the successive owners of the dominant estate, become entitled to the benefits of the rights conferred, and may sue for a violation of them (b).

II. Where the dominant tenement itself is conveyed, all rights which the conveying party enjoyed by virtue of, and as appendant to his estate, as against third parties, pass with it; and if the dominant tenement be severed, each of the severed portions will retain the original right, provided no additional burden be thereby imposed on the servient tenement.

Where there has been unity of ownership of the dominant and servient tenements, and where consequently all easements have been merged in the general rights of property, thereby the grant of the part of a tenement there is an implied grant of the necessary easements to the grantee, but there is no corresponding implication in favour of the grantor, except in such cases as ways of necessity (c).

The maxim of law is that whosoever grants a thing, is supposed also tacitly to grant that without which the grant would be of no effect. Consequently, upon the grant of an easement, all such secondary easements as are essential for its full enjoyment will pass also without further words of grant.

(a) LIGGINS v. INGE, 7 Bing. 693.

(b) COOKE v. CHILCOTE, L. R. 3 Ch. D. 694.

(c) WHEELDON v. BURROWS, L. R. 12 Ch. D. 31.

For example, an easement of water-course implies a right to go on the servient owner's land to repair it; a right of drawing water includes a right to go over the servient land; &c. But no additional burden should be imposed.

As every easement is a restriction upon the right of property of the servient owner, no alteration can be made in the mode of enjoyment by the dominant owner, the effect of which will be to increase such restriction. But a mere alteration in the mode of enjoyment, whereby no injury is caused to the servient tenement, will not destroy the right (a).

A grant of a special right to a water-course may be inferred from a long use and enjoyment without interruption. Easements acquired in this way are said to be acquired by prescription (b).

Where a right to water has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years, the right to such easement is absolute (c). Where the property over which a right is claimed, belongs to Government, the period is sixty years instead of twenty years (d).

But the following rights cannot be acquired by prescription:—

(1) a right to surface water not flowing in a stream and not permanently collected in a pool, tank or otherwise;

(2) a right to underground water not passing in a defined channel (e).

An easement may also be claimed by a particular custom,

(a) LUTTREL'S CASE, 4 Rep. 86.

(b) ANGUS v. DALTON, L. R. 3 Q. B. D. 100; S. C. in appeal 4 Q. B. D. 462.

(c) Section 15 of the Indian Easements Act (V. of 1882).

(d) *Ibid.* See also s. 16 as to exclusion in favour of reversioner of servient heritage.

(e) *Ibid.* s. 17.

as in the inhabitants of a district to use a common watering place; and an action will lie by an inhabitant for the infringement of the right, without proof of special damage (a).

Particular Easements of Water.

The right which a riparian owner has to the flow of a natural stream (b) in its natural state, may be interfered with by the acquisition of easements, the effect of which may be to alter its quantity, velocity or quality, to his prejudice. Thus, a right to *divert* and *obstruct* the flow of the stream, or to *pollute* its waters, may be gained by Statute, grant or long enjoyment.

Where, however, an easement has been acquired, the diversion or obstruction cannot be *materially* altered or increased to the further detriment of the servient owner.

A mere alteration in the mode of enjoyment whereby no injury is caused to the servient heritage, or a trifling alteration in the course of a water-course does not destroy the right (c).

A right to pollute the waters of a natural stream is an easement, which may be acquired, like any other easement, by user; but there can be no prescriptive right to pollute a stream in such a manner and to such an extent as to be injurious to public health (d).

Where a right to pollute a stream has been acquired, the fouling must not be considerably enlarged to the prejudice of the servient tenement, but the user which originated the right must also be its measure (e).

(a) *HARROP v. HIRST*, L. R. 4 Ex. 43. See also s. 18 of the Indian Easements Act (V of 1882).

(b) See Explanation to s. 7 of the Indian Easements Act (V of 1882).

(c) *HALL v. SWIFT*, 6 Scott, 167.

(d) *BLACKBURN v. SOMERS*, 5 L. R., Ir. 1.

(e) *MC INTYRE v. MC GAVIN*, (1883) A. C. 268.

As in the case of diversion and obstruction, a mere change in the quality of the polluting discharge, not increasing as against the servient tenement, to any substantial or tangible degree the amount of pollution, does not destroy the easement (a).

The right to discharge water over the lands of others, or to receive the discharge of water from the lands of others by means of water-courses artificially created, is not a natural right of property, but may, like any other easement, be acquired by contract, grant or prescription.

Where a natural stream having a natural source is diverted by artificial means without injury to the rights of others, the riparian owners who would have had rights on the natural course of the stream do not lose those natural rights from the fact that the water so diverted flows in an artificial channel (b).

A servient owner, however, cannot compel the dominant owner to continue the discharge of water. For an easement exists for the benefit of the dominant owner alone and the servient owner acquires no right to insist on its continuance (c).

With regard to the pollution of artificial water-courses the law is that though a riparian owner has no right to compel the continuance of an artificial water-course, he may have a right to prevent the pollution of it while it continues to run, for no man can have a right to send dirty water on another's land, unless he can prove a prescriptive right so to do (d).

Extinguishment of Easements of Water.

The modes by which easements may be extinguished, sus-

(a) SOMERSET DRAINAGE COMMISSIONERS v. BRIDGWATER CORPORATION, 81 L. T. 72 H. L. (E).

(b) NUTTAL v. BRACEWELL, L. R., 2 Ex. 1.

(c) MASON v. SHREWSBURY RAILWAY, L. R. 6 Q. B. 578.

(d) CAWKWELL v. RUSSELL, 26 L. J., Ex. 34; BALLARD v. TOWLINSON, L. R. 29 Ch. D. 115.

pended or revived, are described in Chapter V of the Indian Easements Act (V of 1882).

The easements of water may be lost—

- (1) By release (s. 38).
- (2) By merger (s. 46).
- (3) By licence (s. 38 (a)).
- (4) By abandonment of user (s. 47).
- (5) By non-user (s. 47).
- (6) By alteration of dominant tenement (ss. 44 and 45).
- (7) By encroachment (s. 43).

When an easement is extinguished, the rights (if any) *accessory* thereto are also extinguished (s. 48).

Illustration.

A has an easement to draw water from B's well. As *accessory* thereto, he has a right of way over B's land to and from the well. The easement to draw water is extinguished.

It was stated before (a) that "*possession*" means "*juridical possession*." Similarly here "*use*" must be taken to mean "*juridical use*" and for the *same* reason. Thus, if a person, who has no right to use certain water, be deprived of the use of it, he cannot sue under this Act for the restoration of the use. To make this clearer suppose, for instance, that A has a right to use certain water, B deprives him of the use otherwise than by due course of law, and on the next day C deprives B of the use in the same manner; then B, not having a right to the use, cannot sue C under this Act for the restoration of it. He has never acquired what the law understands by use, and cannot, therefore, have been deprived of the use. But it is evident that, as A has a right to the use, he can avail himself of the summary remedy given by this Act against B.

[*Right to have water carried off over neighbour's land—Erec-*

tion of building.] A right to have water carried away over the adjoining land does not give its owner any power to prevent the erection of buildings on the adjoining ground so long as the arrangements necessary to the preservation of his right are made.—
BALA v. MAHARU, I. L. R. 20 Bom. 788.

Right to water of river—Riparian proprietors—Diversion—Rights of Government—Khalsa or raiyatwadi land.] A dam had been in existence across a river for upwards of 280 years, and during all that time the villages of D and P had received an equal supply of water from separate sluices in the dam. The Government authorities being of opinion that D required less water than P, reduced the size of the D sluice, and consequently the amount of water flowing to the D village. The village of D was khalsa or raiyatwadi, *i. e.*, was held immediately by Government. The inhabitants of D appealed against the action of Government. Held that the Government had no such right of interference, neither (1) as riparian proprietors (supposing them to be such), since the right to the enjoyment of the water of a river belongs to the occupant of the river-bank, whatever the nature of his tenancy; nor (2) by any other imaginable rights existing in the Government as such, since, if any such rights ever existed, the long user for upwards of 280 years of the water from the dam by the village of D would be amply sufficient to justify a presumption of an original *animus dedi-candi* in the Government.—COLLECTOR OF NASIK v. SHAMJI DAS-RATHI PATIL, I. L. R. 7 Bom., 209.

[*Natural water-course—Riparian proprietors—Obstruction to the flow of water—Injunction—Jurisdiction—Mamlatdars' Courts Act (Bom. Act III of 1876), s. 4.*] Held by the Full Bench (WHITWORTH, J., dissenting), that a Mamlatdar has, under the Mamlatdars' Courts Act (Bom. Act III of 1876), jurisdiction to inquire into a case in which it is alleged that an upper riparian proprietor has unduly interfered with the flow of water in a natural water-course from which a lower riparian proprietor also takes water.—SOM GOPAL BHOGAT v. VINAYAKE BHIKAMBHAT, I. L. R. 25 Bom. 395; 2 Bom. L. R. 1136.

[*Dispute between riparian proprietors as to the quantity of water—Suit for injunction—Jurisdiction.*] Plaintiffs and defendants were riparian proprietors, defendants' lands being situated

higher up the stream than that of the plaintiffs. There were several dams erected in the bed of the stream for the purpose of regulating the flow of water to the lands of the different riparian proprietors. One of these dams belonged to the plaintiffs and another to the defendants. The distance between the two dams was 62 cubits.

Plaintiffs alleged that in the defendants' dam there had always been a sluice or passage left through which the water flowed down to the plaintiffs' dam and there come to a head, that they had always used the water so collected to irrigate their rice lands in the hot season. They complained that in October, 1896, the defendants, contrary to this established practice, erected a solid dam without any sluice or passage in it and thereby stopped the supply of water to their (plaintiffs') lands. They, therefore, prayed for an injunction directing the defendants to open a sluice in their dam, and restraining them from causing any obstruction in future to the passage of the water on to the plaintiffs' dam.

The defendants pleaded that there never had been any sluice or passage in their dam, and that the plaintiffs' user, if any, had not been obstructed by them.

The Mamlatdar found in favour of the plaintiffs, and made an order on the defendants, that "at the time of building their dam, in the month of Kartik every year, or about that time, they should, according to the *vahivat* (or established practice) leave a sluice one foot in length and half a foot in height for the purpose of supplying water to the plaintiffs."

On an application under s. 622 of the Code of Civil Procedure (Act XIV of 1882)—

PARSONS, J.:—"The question is whether the Mamlatdar had jurisdiction to hear such a suit and grant such an injunction. We are of opinion that he had not. We think that a person can only sue under the Act when he has been dispossessed or deprived of the use, or when he has been disturbed or obstructed, or when an attempt has been made to disturb or obstruct him in the use of water of which he is in possession or was in possession within six months before suit. A owes a well or water-course, which is in his possession. If B prevents A taking water therefrom, or takes water therefrom himself, a suit will properly lie; but if A owns one portion of a water-course and B another, and if B takes from

his portion more water than he is entitled to, so that a less amount flows down to A, we conceive no suit would lie in a Mamlatdar's Court, because A never was in possession of the use of the water to B's water-course and no obstruction has been caused to A's use of the water that might be in his water-course. If such a suit lay, then the injunction would have to be not merely that provided by Schedule (c) of the Act, but an order on the defendant to do, or refrain from doing, something with his own property such as has actually been passed by the Mamlatdar in this case, for which no authority can be found in the Act. It is obviously undesirable that the nice questions which may arise between riparian proprietors as to the amount of water each can take from a stream should be determined by a Mamlatdar's Court. This really is the question at issue in the present case. It is not whether the plaintiffs have been obstructed in the use of water in their water-course, but it is whether the defendants have, by exceeding their rights as owners of land abutting on the stream, caused injury to other owners, the plaintiffs. We are of opinion that such a suit does not come within the Mamlatdars' Courts Act."—BABAJI RAMJI v. BABAJI DEVJI, I. L. R. 23 Bom. 47.

[*Artificial channels—“Water-course”—Rights of riparian owners—Easements Act (V of 1882) s. 7, ill. (h)—Unreasonable diversion of water—Mamlatdar's jurisdiction—Bombay Act III of 1876, s. 4.*] The word “water-course” is not restricted to artificial channels. Though the waters flow intermittently, yet when the rains come if they flow in a defined channel or course, it fulfils the definition of a natural stream given in the explanation of s. 7 of the Easements Act (V of 1882).

The law as to riparian owners is the same in India as in England, and is stated in illustration (h) of s. 7 of the Easements Act (V of 1882). Each proprietor has a right to a reasonable use of the water as it passes his land, but, in the absence of some special custom, he has no right to dam it back, or exhaust it, so as to deprive other riparian owners of like use.

What would constitute an unreasonable diversion of water such as to disturb the use of the lower riparian owners, is a question of fact which the Legislature has given a Mamlatdar jurisdiction to decide.

In BABAJI RAMJI v. BABAJI DEVJI, I. L. R. 23 Bom. 47, the parties relied, not so much on their general rights as riparian owners, as on some custom by which each owner in turn had dammed and impounded the water—NARAYAN v. KESHAV, I. L. R. 23 Bom. 506.

[*Right of riparian proprietor—Bunds or embankments.*] A riparian proprietor may deal with the stream as freely as with any other portion of his land, provided only that he must not by so doing sensibly disturb the natural condition of the stream as it exists within the limits of other proprietors, whether above or below, or on the opposite side.—MOONOUR HOSSEIN v. KANHYA LALL, 3 W. R. C. R. 218.

[*Riparian proprietor—Natural water-course.*] The right which a riparian proprietor has, under certain restrictions, to the use of the water of a natural water-course, has no application to a water-course artificially constructed; and the mere fact of riparian proprietorship, gives no rights whatever over such a stream.—BHOOP NARAIN SINGH v. KERAMUT ALI, 6 W. R. C. R. 99.

[*Right to discharge water on to another's land on lower level—Drainage.*] There is no reason why the proprietor of land on a higher level should not, for the purpose of keeping his land drained, claim a right to have the water which falls thereon, run off over adjoining land on a lower level.—KUPIL POOREE v. MANICK SAHOO, 20 W. R. C. R. 287.

[*Right to drainage of surplus surface water through natural water-course.*] The right of the owner of high lands to drain off its surplus surface water through the adjacent lower grounds is incident to the ownership of land in this country. Where the defendants had erected a dam across a natural water-course which was found to interfere with the natural drainage of the surplus rain-water of the adjacent lands of the plaintiffs, and where the lower Court had ordered that the dam be altogether removed,—Held that the Court was wrong in taking it for granted that the plaintiffs were entitled to have the whole dam removed, but should have inquired how far the erection of the dam interfered with the plaintiff's right—ABDUL HAKIM v. GUNESH DUTT, I. L. R. 12 Calc. 323.

[*Right to use of water—Artificial water-course.*] In 1860,

R, whom the plaintiff in this suit represented, agreed with Government for the lease of a plot of ground called the D estate and got possession. In 1865, R took a lease of the estate from Government for 999 years, to enure as a lease from 1860, the time at which he entered upon possession. The defendant's estate adjoined plaintiff's. Defendant's title, also derived from Government, dated from 1869. A formal lease was granted to his predecessor in 1874 in similar terms, to that to plaintiff. In 1864, R opened an artificial channel for the conveyance of water for the use of his estate. This channel was taken off from a ravine in Government waste land, and before reaching the plaintiff's estate passed through land which in 1864 belonged to Government, but which subsequently formed portion of the defendant's estate. When the lease, under which the defendant claimed, was made in 1874, the flow of water through the channel was enjoyed by the plaintiff. The plaintiff sued to restrain the defendant from interfering with and diverting the flow of water in this channel and for damages. *Held* that the flow of water in the channel having existed as an apparent and continuous easement in fact at the time of the execution of the lease in 1865, a right to it passed by implication under that lease, and that the plaintiff was accordingly entitled to it; that the defendant, whose lease was subject to that right, was not entitled to interrupt the flow; but that he might use the water in a reasonable manner, as it flowed through his land.—MORGAN v. KIRBEY, I. L. R. 2 Mad. 46.

[*Right to discharge surplus water on another's land.*] Where A has a right to discharge the surplus rainfall from his land on to the land of B, no length of time will give B a right to compel A to send the water on; provided that A does not interfere with any portion of the water which flows from his land to that of B in a natural and defined channel. The servient owner cannot prevent the dominant owner from putting an end to the servitude at any time he may think proper.—KHOORSHED HOSSEIN v. TEKNABAIN SING, 2 Cal. L. R. 141.

[*Right to use of water—Artificial water-course.*] The right to water flowing to a man's land through an artificial water-course, constructed on a neighbour's land, must rest on some grant or arrangement, proved or presumed, from or with the owner of the land from which the water is artificially brought, or on some other legal

origin. Such a right may be presumed from the time, manner and circumstances under which the easement has been enjoyed.—
RAMESSUR PERSHAD NARAIN SING v. KOONJ BEHARI PATTUK, I. L. R. 4 Calc. 633; S. C. L. R. 6 I. A. 33.

[*Right to use of water—Irrigation—License—Revocation of agreement to use water.*] In a suit to establish a right of water and for damages for interruption of the same, the facts were as follow: Plaintiff and defendant by agreement between them constructed a dam across a main channel, and from thence a smaller channel was made through the land of the defendant to the plaintiff's land, by means of which it was agreed that the plaintiff should be at liberty to irrigate the fields. The agreement was acted upon for a long course of years. Held that the agreement was not a mere parole license revocable at the pleasure of the defendant, but an agreement which created a right of easement, unlimited in point of time to the use of the water by the plaintiff, and imposed upon the defendant the corresponding duty of allowing the accustomed supply to flow. A mere license differs in its effects from a license coupled with the creation of an interest. The former is revocable, but the latter is subject to the same incidents and is as binding and irrevocable as any other contract, gift or grant.—KRISHNA v. RAYA-PPA SHANBHAGA, 4 M. H. C. R. 98.

[*Water in defined channel.*] From time immemorial a certain "al" formed the boundary of two pieces of land belonging to the plaintiffs and the defendants respectively. The plaintiffs' land was on a higher level than that of the defendants, and from time immemorial the surplus water used to flow from the plaintiffs' land, through certain passages in the "al" and across the defendants' land. The defendants closed up the passages and increased the height of the "al." Held that, it having been established that for a long series of years the waters from the plaintiffs' land had been accustomed to escape in a particular direction and by certain separate passages across the defendants' land, the defendants could not do anything which would interfere with the plaintiffs' rights in this respect.—IMAM ALI v. PORESH MUNDUL, I. L. R. 8 Calc. 468; S. C. 10 Cal. L. R. 396.

[*Right to passage of water—Easements of necessity.*] A and B were originally in joint possession of certain land. They

divided this land in 1865, and, ten years later, built at their joint expense a partition wall between their respective portions, leaving a drain in the wall for the passage of water from A's to B's land. In 1885 B stopped the flow of water by this drain. A thereupon sued for an injunction to restrain B from causing the obstruction. The Court of first instance decreed the claim. The Appellate Court rejected the claim, on the ground that there was no express agreement between the parties that the water should be carried by the drain in the wall. *Held* on second appeal to the High Court that A would be entitled to the easement claimed by him if he could show either that it was necessary for the enjoyment of his share of the property, or that it was apparent and continuous and necessary for enjoying the share as it was enjoyed when the partition took effect.—**PURSHOTAM SAKHARAM v. DURGOJI TUKARAM**, I. L. R. 14 Bom. 452.

[*Permission to erect dam.*] When a tenant by his lessor's permission erected a dam upon his holding, and thereby obstructed the natural flow of the water to other lands of the lessor,—*Held* that the mere permission did not amount to a grant. *Held* also that there was no implied grant of the right to use water so as to derogate from the rights of those through whose lands the stream would otherwise flow. *Held* also that the right under the permission might be terminated by revocation of the latter, but that such revocation would only be permitted on the terms of the landlord paying to the tenant the expenses which that permission had led him to incur. Even when the dominant and servient tenements are the property of different persons, a man may license an act in its inception, and yet be entitled to relief when the act is found to have injurious consequences which he could not have contemplated at the time of the license.—**KESAVA PILLAI v. PEDDU REDDI**, I Mad. H. C. R. 258.

[*Right to flow of water—Obstruction.*] Acquiescence in the sense of mere submission to the interruption of the enjoyment does not destroy or impair an easement. To be effectual for that purpose, it must be attributable to an intention on the part of the owner to abandon the benefit before enjoyed.—It must appear from the circumstances in evidence in such case that the interference or obstruction complained of is not a trivial, but a substantial injury in order to warrant relief by way of injunction.—The right to an

easement in the flow of water through an artificial water-course is as valid against the Government as it is against a private owner of land.—5 Mad. H. C. R. 6.

[*Obstruction to flow of water—Erection of bund.*] A party claiming to erect a bund in a natural flowing river, so as entirely to cut off the water from another party, is bound to prove that he has acquired the legal right to do so by user.—HEERANUND SAHOO v. KHUBEROONISSA, 15 W. R. C. R. 516.

[*Deprivation of right to a rise of water by breaking bund.*] Deprivation of the right to a rise of water is an injury, and a claim to repair a bund for the purpose of securing such right is not answered by the tender of another bund quite as good.—SHUNKAR SAHOO v. GURBHOO SAHOO, 15 W. R. C. R. 216.

[*Infringement of right to water—Suit to remove obstruction and for damages—Cause of action.*] In a suit to compel defendant to remove an embankment recently constructed on his own land, on the allegation that it infringed plaintiff's right of irrigation by a certain channel, where it was found that the embankment in question was no manner of obstruction to the water-course by that channel, *Hell* that, to entitle plaintiff to a decree, there must have been some actual infringement of his right by the defendant, and not merely some act whereby, as it were, that right was denied or questioned.—SHAMA CHURN CHATTERJEE v. POIDONATH BANERJEE, 11 W. R. C. R. 2.

[*Solid dam—Obstruction to the flow of water—Suit for Injunction—Jurisdiction—Right to the use of water.*] The facts of the case sufficiently appear from the following:—

Judgment.—This case raises an important question of jurisdiction under the Mamlatdars' Courts Act, 1876. The parties are riparian occupants of land situated on the banks of a rivulet, the land of the defendants being higher up the stream than that of the plaintiffs. In order to regulate the flow of water dams are erected in the bed of the stream and thus a head of water is obtained which is led off by channels into the adjacent fields. There are it seems no less than six of such dams of which the plaintiffs own one and the defendants another. Each of the owners is by custom allowed to take a certain

quantity of water leaving the rest to flow over his dam to the dam of the next owner. The plaintiffs, allege that as their dam is very close to the defendants', being only 62 cubits below it, the custom is that the defendants should not have a solid dam but one with a sluice or passage left in it so that the water should not be dammed up very much if indeed at all by the dam but should flow on to their dam and be there brought to a head, and that in the month of Kartik 1896 the defendants in breach of that custom erected a solid dam, and they sue for an injunction that the defendants should be ordered to open a passage in their dam and should not disturb or obstruct the flow of water. The Mamlatdar raised the issues mentioned in Section 15 (c) of the Act, he did not, however, record any findings thereon, but he decided that "an injunction be issued to the defendants that at the time of building their dam in the month of Kartik every year or about that time, they should according to the vahiyat leave a sluice one foot in length and half a foot in height for the purpose of supplying water to the plaintiffs." The question is whether he had jurisdiction to hear such a suit and grant such an injunction. We are of opinion that he had not. We think that a person can only sue under the Act when he has been dispossessed or deprived of the use, or when he has been disturbed or obstructed or when an attempt has been made to disturb or obstruct him in the use of water of which he is in possession or was in possession within six months before suit.

A owns a well or watercourse, which is in his possession. If B prevents A taking water therefrom or takes water therefrom himself, a suit will properly lie, but A owns one portion of a watercourse and B another, and if B takes from his portion more water than he is entitled to, so that a less amount flows down to A, we conceive no suit would lie in a Mamlatdar's Court, because A never was in possession of the use of the water in B's watercourse and no obstruction has been caused to A's use of the water that might be in his watercourse. If such a suit lay then the injunction would have to be not merely that provided by Schedule (c) of the Act but an order on the defendant to do or refrain from doing something with his own property such as has actually been passed by the Mamlatdar in

this case for which no authority can be found in the Act. It is obviously undesirable that the nice questions which may arise between riparian proprietors as to the amount of water each can take from a stream should be determined by a Mamlatdar's Court. This really is the question at issue in the present case. It is not whether the plaintiffs have been obstructed in the use of water in their watercourse, but it is whether the defendants have, by exceeding their rights as owners of land abutting on the stream, caused injury to other owners, the plaintiffs. We are of opinion that such a suit does not come within the Mamlatdars' Courts Act.—BABAJI RAMJI v. BABAJI DEVJI SALKAR, Prin. Judg. for 1897, p. 473.

[*Riparian right—Bunds—Cause of action.*] The right of a riparian proprietor to the water of the stream on which his property is situated, is not a *prescriptive* right ; but a right naturally incident to his property in the land. Where fresh bunds are erected every year to the injury of such a proprietor, each one of the acts of setting up a bund constitutes a separate cause of action.—THE COURTS OF WARDS v. RAJA LEELANUND SINGH BAHADOUR, 13 W. R. C. R. 48.

[*Watercourses — Rights — Embankments.*] Where water flows in its natural course from somewhere outside A's land, through it, and onwards to other people's land, A. is not entitled to stop the flow by an embankment across it unless he can make out some special right to do so. Such course is a part of the natural condition of the land, and the flow of the water over it, when it occurs, is a natural incident. 13 W. R. 144 distinguished.—BABOO CHUMROO SINGH v. MULLICK KHURUT AHMED, 18 W. R. C. R. 525.

[*Abandonment of right to water—Construction of new water-way.*] Where a party suing for the use of a waterway was found to have allowed it to be filled up without objection, and another of the same description to be constructed, which he had used for a year or two, he was held to have abandoned his right of user to the former waterway.—JUGUTRUNDHOO CHUCKERBUTTY v. JUGUT CHUNDER CHOWDHRY, 12 W. R. C. R. 519.

[*Right of owner of two properties—Dispersion of rain-water.*] The owner of two properties may conduct through troughs the rain-water accumulating on one property over a water-course to the other property before it reaches another water-course into which the rain

water, unless diverted, would naturally flow.—RAMRUTTUN NEOGEE v. PHOOL SINGH, W. R. (1864) C. R. 147.

[*Right to water—Easement.*] Water falling on A's land and collected in a reservoir there used to flow into B's land. *Held* that B had no right to the use of the water, and that A was entitled to erect on his own land a bund to prevent the water flowing on to B's land.—BUNSEE SAHOO v. KALEE PERSHAD, 13 W. R. C. R. 414.

[*Water-rights for irrigation where a stream flows through separate estates—Relative rights of upper and lower proprietors on the banks to the use of the water.*] A riparian owner, where a stream flows in a channel down from a property higher up, is entitled to the flow of water without interruption, and without substantial diminution caused by the upper proprietor, who may for legitimate purposes withdraw so much only of the water as will not materially lessen the downward flow on to his neighbour's land. In this suit the upper proprietor claimed the right to dam up a stream on his own estate, and to impound so much of its water as he might find convenient for irrigation, having only the surplus, if any, for the use of the proprietors below. He has no such right, in the absence of a right obtained by him in virtue of contract with the lower proprietors, or acquired by him as a consequence of prescriptive use. His common law right is to take for the purpose of irrigation so much water only as can be abstracted without materially diminishing what is to be allowed to descend. What quantity of water can be abstracted and used without infringing that essential condition, must, in all cases, be a question of the circumstances depending mainly upon the size of the stream and the proportion which the water taken bears to its entire volume. In this suit, the upper proprietor's claim having been put too high, the real question as to the proportion of his share had been omitted. No issue had raised it, and no evidence had been given to determine it approximately. The Court of first instance and the first Appellate Court had attempted to decree what they considered would be the just proportion, but the High Court had rightly pointed out that there had been no materials before the Courts upon which a right to a more limited kind than that which had been in excess claimed could be decreed to the upper proprietor; and the suit could be rightly dismissed.—DEBI PERSHAD

SINGH v. JOYNATH SINGH, I. L. R. 24 Calc. 865; S. C., L. R. 24 I. A. 60; S. C., 1 Cal. W. N. 401.

[*Irrigation channels—Power of Collector to regulate water-supply.*] In a suit between raiyats holding lands under Government, in which the Collector of the district was joined as second defendant, it appeared that the first defendant, in pursuance of an order of the Sub-Collector, made on a petition preferred by him, had opened a new irrigation channel, thereby materially diminishing the supply of water necessary for the cultivation of the plaintiff's land and causing damage to him. The Lower Court passed a decree for damage and issued an injunction directing that the channel be closed. *Held*, that the order of the Sub-Collector was in excess of his powers.—RAMCHANDRA v. NARAYANASAMI, I. L. R. 16 Mad. 333.

(I) "Wells."

The word "well" means a pit or cylindrical hole, sunk perpendicularly into the earth to such a depth as to reach a supply of water, and walled with stone to prevent the earth from caving in (a).

If there is a natural spring, the waters of which flow in a natural channel, it cannot be lawfully diverted by any one to the injury of the riparian proprietors. This principle is not affected by the fact that the source of the spring had been built round and formed into a well, thus making an artificial channel for a short distance (b).

A landowner by sinking a shaft on his own ground, may lawfully intercept water and prevent it from percolating into another landowner's well, and may so actually abstract or withdraw water from the well; for the injury caused to his neighbour is *damnum absque injuria* (c).

It is moreover decided that a prescriptive right by long user to the water of the well or surface stream, with which

(a) Webster's English Dictionary.

(b) DUDDEN v. GLUTTON UNION, 11 Ex. 627; MOSTYN v. ATHERTON, 2 Ch. 360.

(c) ACTON v. BLUNDELL, 12 M. & W. 324.

the sinking of the shaft interfered, would give no further right of action.

Where defendant sold to plaintiff a well, and the right of conveying water therefrom through defendant's land without interruption or disturbance, it was held that defendant had only conveyed the flow of the water after it had risen in the well, and that no action would lie for the interception of percolating water before it reached the well (a).

Where water which has actually percolated into, and is in a well, has been abstracted by operations in the adjoining land, no action will lie. The only remedy of the owner of a well from which such water has been abstracted, is to sink the well deeper.

One has a right to all the water which he can draw from the different sources which may *percolate* underground; but that has no bearing at all on what he may do with regard to water which is in a *defined* channel, and which he is not to touch. If he cannot get at the underground water without touching the water in a defined channel, he cannot get at it at all (b).

No one has a right to cause *polluting* matter to percolate through the soil and foul the water of the plaintiff's well. Thus a distinction is drawn between the right to divert and the right to pollute water arising from temporary causes (c).

When an easement is extinguished, the rights (if any) *accessory* thereto are also extinguished.

Illustration.

A has an easement to draw water from B's well. As *accessory* thereto, he has a right of way over B's land to and from the well. The easement to draw water is extinguished by non-enjoyment. The right of way is also extinguished (d).

- (a) BRAIN v. MARFELL, 41 L. T. N. S. 455.
- (b) GRAND JUNCTION CANAL v. SUGAR, L. R. 6 Ch. 483.
- (c) WOMERSLEY v. CHURCH, 17 L. T., N. S. 190.
- (d) Section 48 of the Indian Easements Act (V of 1882).

[*Right of inhabitants to take water from private well—Easement—profit a prendre—Long user.*] The inhabitants of a town claimed a right to take water from a well belonging to the plaintiffs. Held, that it was a customary right in the nature of an easement, capable of being acquired by long user and not a *Profit a prendre*.—SHUNMUGAM PILLAI v. VENKATESWARA AIYAR, 2 Madras Law Journal, 290.

[*Right to draw water from a public well and pour into a trough—Suit for restoration—Jurisdiction.*] The facts appear from the judgment of the High Court.

JUDGMENT.—Plaintiff's claim was to have his "right of drawing water out of a public well and pouring it into a trough for cattle to drink out of in the hot weather," restored to him, and the Mamlatdar has ordered that "the possession of taking water out of the public well in the village of Maroli and keeping the same in the trough near the well for cattle to drink in charity illegally acquired by defendants 1 to 5 should be removed from them and given to the plaintiff." We are of opinion that the Mamlatdar had no jurisdiction to make such an order. The right to draw water from a public well and pour it into a trough does not come within any of the objects mentioned in Section 4 of which the Mamlatdar could give immediate possession. Of course, if the plaintiff had alleged that the trough was his own or that he was in possession of it and claimed the right to an exclusive possession of the trough itself subject to the right of the public to allow their cattle to drink out of it, the case might be different. But no such claim was made in this case. As the well is a public one, each member of the public has the right of drawing water from it, and as the trough was a public one, all cattle that came could drink out of it, and any one who was charitably disposed could pour water into it. There is, therefore, no right to be protected in this case and nothing upon which the order of the Mamlatdar can operate.—LAXMAN GANESH KALE v. GOPAL HARI MARATHI, Prin. Judg. for 1895, p. 324.

[*Easement over a well—Easements Act (V of 1882), s. 2 (b)—Customary right to use the well.*] No fixed period of enjoyment is laid down by law as necessary to establish a customary right, and a customary right to use a well may exist apart from a dominant heritage.—PALANIANDI TEVAN v. PUTHIRAN GONDA NADAN, I. L. R. 20 Mad. 389.

[*Well—Stopping way to the well—Suit for restoration of the use—Mamlatdar—Jurisdiction.*] Plaintiff sued defendant for restoration of the use of a well, the defendant having stopped his way to the well by building a wall.

The Mamlatdar rejected the plaint saying—

“ The real question in this case is whether plaintiff's prayer for the obstruction in the right of way to the well can be heard by me. I doubt this as I am not empowered by the law. ”

On application under s. 622 C. P. C., the High Court decided as follows :—

JUDGMENT.—If the defendant by building a wall has prevented the plaintiff from having access to a well from which he had the use of water, he would clearly have obstructed the plaintiff in the possession of that use, and the Mamlatdar would have jurisdiction to try the case. The fact that the Act mentions roads or customary ways to fields only would not exclude this jurisdiction.—**VOHORA AJABSHA LALBHAI v. TAYABALLI KAMRUDDIN HEBTULLABHAI**, 2 Bom. L. R. 243.

[*Well-water—Joint use—Non-payment of share of expenses—Non-exercise of enjoyment—Adverse enjoyment.*] Where the plaintiff had a right to the use of a well water, in common with others, his preferring not to use the water, or even his omission to pay his share of expenses, did not of itself destroy that right by mere non-exercise of it, but there should be some direct evidence of adverse enjoyment on the part of the defendants.—**BALI BIN KHETRI v. DNYANU BIN BAKAJI MOHITE**, 2 Bom. L. R. 620.

[*Customary right to use the well.*] Where all the residents of a certain locality had been using the water of a certain well, and the plaintiff by possessing a house had become a resident of that locality ; Held, that he had acquired the right of easement to use the water of the well.—**PALANIANDI TEVAN v. PUTHIRAN GOUDA NADAN**, I. L. R. 20 Mad. 389.

(J) “ TANKS. ”

The word “ *tank* ” means a large basin or cistern ; a reservoir of water (a).

[*Natural streams—Easements Act (V of 1882) ss. 6, 7, 17—Surface water—Tank—Rights of riparian owners.*] The owners of a tank fed by natural streams which depended for their supply on natural rainfall and surface water, sued for an injunction to restrain superior riparian owners from damming the streams or interfering with the supply of water, over which the plaintiffs claimed a right of easement. The issue as to the ownership of the land on which the streams rose was undecided. Held (1) The Easements Act (V of 1882) only declared the existing law as to easements over water ; (2) An easement can therefore be acquired in regard to the water of the rainfall. But surface water not flowing in a stream and not permanently collected in a pool, tank, or otherwise, is not a subject of easement by prescription, though it may be the subject of an express grant or contract ; (3) It is the natural right of every owner of land to collect or dispose of all water on the surface which does not pass in a defined channel ; (4) Riparian owners are entitled to use and consume the water of the stream for drinking and household purposes, for watering their cattle, for irrigating their land, and for purposes of manufacture subject to the conditions (i) that the use is reasonable, (ii) that it is required for their purposes as owners of the land, and (iii) that it does not destroy or render useless or materially diminish or affect the application of the water by inferior riparian owners in the exercise either of their natural right of their right of easement if any ; (5) It was, therefore, necessary to ascertain where the streams rose, and course, source and length of their tributaries.—*PERUMAL v. RAMASAMI*, I. L. R. 11 Mad. 16.

[*Tank—Right to throw back water on another's land—Right of other person to relieve himself from inconvenience.*] The tank used for the irrigation of the plaintiff's village was supplied in part by rain-water falling on the lands of the village occupied by defendants 9 to 17, and the bund of the tank used formerly to throw back the waters so flowing into the tank on to the lands of defendants, where it remained till gradually drawn off into the area of the tank. Defendants 9 to 17, through the agency of the Government, relieved themselves of this inconvenience by making a work for draining off the water so periodically thrown back upon their land. A channel was also constructed for conducting a supply of water to the plaintiff's tank. Plaintiff's, however, claimed to have the former

state of things restored, on the ground that they had a prescriptive right to throw back the water on to the defendant's lands and to keep it there till required for use. *Held* that there was here no object over which a right could be acquired.—ROBINSON (COLLECTOR OF NORTH ARCOT) v. AYYA KRISHNAMA CHARIYAR, 7 Mad. H. C. R. 37.

[*Right to surplus water of tank.*] A right of easement may be acquired in the surplus water of a tank flowing through a defined channel, whether natural or artificial.—RAYAPPAN v. VIRBHADRA, I. L. R. 7 Mad. 530.

[*Duty of Zemindar—Ancient tank—Liability for damage occasioned by overflow of tanks.*] The public duty of maintaining ancient tanks, and of constructing new ones, was originally undertaken by the Government of India, and upon the settlement of the country has, in many instances, devolved upon zemindars. Such zemindars have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged under the Indian law, by reason of their tenure, with the duty of preserving and repairing them. The rights and liabilities of such zemindars with regard to their tanks are analogous to those of persons or corporations on whom statutory powers have been conferred and statutory duties imposed. Such a zemindar, if the banks of any tank in his possession are washed away by an extraordinary flood without negligence on his part, is not liable for damage occasioned thereby.—THE MADRAS RAILWAY COMPANY v. THE ZEMINDAR OF CARVETINAGARAM, 14 BENG. L. R. 209; S. C. 23 W. R. 279; S. C. L. R. 1 Ind. App. 364.

[*Customary right—Easement—Diversion by the upper proprietor—Unreasonableness of custom—Natural stream—Riparian rights—Extraordinary uses.*] A natural stream in the Sivagunga zemindari fed a number of tanks through supply channels, one of which supplied the defendant's villages and another a village lower down the stream. The plaintiffs, the lessees of the zemindari, sued for the removal of a dam put up by the defendants, across the stream to divert their water into their supply channel distinguishing thereby the water available for the tank T. *Held*, (1) that in the absence of an easement of customary right to the contrary, the defendants would not have the right to put up the dam so as to

diminish the supply available to the plaintiffs. SWINDON WATER WORKS Co. v. WILTS AND BERKE CANAL NAVIGATION Co., L. R. 7 H. L. 697 followed, (2) that such a right of the nature of an easement could be acquired by custom and the defendants in the case had so acquired it, (3) that such a custom cannot be deemed to be unreasonable and (4) that the defendants as lessees of one of the villages of the zemindari were not incapable of acquiring such rights as against the plaintiffs as the subsequent lessees of the zemindari. *Per Cur* :—A natural stream is one which has a natural source and flows in a natural channel.—R. G. ORR v. RAMA V. CHETTY, I. L. R. 18 Mad. 320; S. C. 4 Madras Law Journal, 248.

[*Cessation to make use of water—Revocation of permission.*] Where a party, who had enjoyed the permissive use of the water of a tank, does not use it for four years from the date of its further excavation, the permission may be taken to be revoked.—GOOROO CHURAN SOOR v. SREE CHURN GHOSE, 15 W. R. C. R. 308.

[*Water from tank.*] Where a plaintiff alleged that subsequent to his purchase of a tank, at a period specified, defendants had commenced to take water from it and had opened a channel for the discharge of the water ; *Held* that the onus lay on the plaintiff to prove the assertion on the part of the defendants of any new right.—BUNGSHEE DHUR THAKOOR v. KHETTURMONEE DEBIA, 11 W. R. C. R. 15.

(K) "CANAL."

The word " *canal* " is not defined in this Act, nor in the General Clauses Act (X of 1897) nor in the Bombay General Clauses Act (I of 1904). The ordinary meaning of the word is an artificial passage for water.

In the Bombay Irrigation Act (VII of 1879) the word canal is explained in s. 3 cl. (1) for the purpose of that Act.

The definition of canal given in the English treatises on the law of waters is as follows :—

A canal may be defined to be an artificial highway by water constructed for the benefit of the public by adventurers authorised by the legislature to take tolls for its use, as a compensation for their risk and labour in the undertaking (a).

(a) Coulson and Forbes on the Law of Waters, 2nd Ed., p. 275.

As regards the rights and obligations of owners of water-courses under the Bombay Irrigation Act (VII of 1879) see s. 21 *et seq.*

The rule that the purpose for which the waters of an artificial water-course have been collected or caused to flow, is to be regarded in determining whether rights or interests can be acquired in them by other persons than those who collected them or caused them to flow, applies with still greater force to the waters of canals than to artificial water-courses of an ordinary character. A canal company having a duty imposed on it by the legislature to keep open the canal, the legislature must be taken at least *prima facie* to have intended that the powers and control over the waters of the canal should be vested in the company. A canal company which has enjoyed for a number of years the flow of the surplus waters of another canal lying on a higher level, has no right to insist continuance of the flow. Nor can the water of a canal be abstracted by the adjacent proprietors without the consent of the company (a).

The rights and liabilities of parties in respect of artificial streams and water-courses are entirely distinct from the rights and liabilities of riparian proprietors in respect of natural streams and water-courses. The water in an artificial stream is the property of the party by whom it is created or caused to flow. If the stream so created is made to flow upon the land of a neighbour without his consent, it is a wrong for which the party causing the flow is liable; but he may by long enjoyment give a right to continue the discharge. His neighbour, however, cannot gain by long enjoyment a right to insist on the continuance of the discharge. As between intermediate proprietors below the one by whom the artificial water-course is created or caused to flow, the upper one may at first intercept the water, but by twenty years' use the lower proprietor gains a right to the flow as against the upper one (b).

Persons who have a right to navigate a canal are not

(a) Kerr on Injunction, 3rd Ed., p. 250.

(b) *Ibid.* p. 249.

limited to any mode of traction or propulsion. They may use steam power, provided it occasions no more than ordinary injury to the canal (a).

Other cases of nuisance to water are obstructions or damage to canals (b).

Waste water allowed to pass from a canal is not a water-course (c).

[*Irrigation—Right of water.*] The plaintiff had been disturbed in his use of the water flowing from a natural stream through a canal of his own by the defendant tapping that canal and abstracting water therefrom for his own lands. Held, that the defendant could obtain no right to tap the plaintiff's canal unless he had acquired that right by grant or prescription. The proper issue was whether the defendant had acquired any right to cut a canal from that of the plaintiff to his own land. Had such been the issue, the defendant would have been entitled, on proof of ancient user of the water from the stream, to restore the ancient water-course by removing any obstruction to the extent of his right of user, but not further or otherwise, and subject to this condition that he had not by non-user lost his right. The defendant is only entitled to remove the obstruction caused by the flood, and not to open out a passage from any other part of the stream. If he has to go over the land of another, and even if he goes over his own land, he can only take the water to such an extent and in such a manner as not to injure the plaintiff or others who have acquired rights.—RUN BAHADOUR v. POODHEE ROY, W. R. Sp. No. Civ. Rul. 319.

[*Pyne—Use of water—Right to control the use.*] The proprietor of a *pyne* has a right to allow or to deny the use of water flowing through it to other persons unless they have also a clearly defined right enabling them to control the water and to convert it to their own use, a right clearly found to have originated in some grant or valid contract, or to have been exercised for so long a period that such title may be presumed.—MAHARANEE KOOER v. LUCHMEE KOOER, 14 W. R. C. R. 349.

(a) Kerr on Injunction, 3rd Ed., p. 247.

(b) *Ibid.* p. 261.

(c) Coulson and Forbes on the Law of Waters, 2nd Ed., p. 231 n (8).

[*Bombay Irrigation Act (Bom. Act VII of 1879), s. 48—Leakage water—Rights of riparian proprietors—Water-course—The power of the Irrigation Department.*] The Irrigation Department has no power, under Bombay Act VII of 1879, to dam a stream or a water-course on the ground that it derives its supply of water by leakage from an irrigation canal. Section 48 of the Act only gives the Department the special right of charging a water-rate on land which derives benefit from the leakage.

Water which has leaked from a canal into the land of another person does not belong to the Irrigation Department, so as to give the latter the right to follow it up and claim it as their own.

If the leakage flow was such that it itself had become, in the eye of the law, a canal or water-course, then the rights of the persons through whose lands it flowed would be governed by the law applicable to canals or water-courses.—*BALVANTRAO v. F. L. SPROTT*, I. L. R. 23 Bom. 761; *S. C. 1 Bom. L. R. 414*.

(L) " WHETHER NATURAL OR ARTIFICIAL."

These words are inserted after "water-course" to embody the result of the decision in *SUM GOPAL v. VINAYAK BHIKAM-BHAT*, I. L. R. 25 Bom. 395.

(M) " PERSON."

The word " *person* " is not defined in this Act. In cl. (35) s. 3 of the Bombay General Clauses Act (Bombay Act I of 1904) it is stated that " *person* " shall include any company or association or body of individuals, whether incorporated or not. This explanation agrees with the explanation of the word " *person* " in s. 11 of the Indian Penal Code. The Bombay High Court has decided that this explanation of the word " *person* " is wide enough to include Government (a). If Government has to bring a suit of the nature described in this section, a regular suit must be instituted in the Court of the District Judge, in whose Court *alone* such suit, that is, a suit in which the Government or any officer of Government in his official capacity is a party can be instituted (b). Consequently such a

(a) *REG. v. HANMANTA*, I. L. R. 1 Bom. 610 at 622.

(b) Section 15 of the *Bombay Revenue Jurisdiction Act (X of 1876)*.

suit cannot be instituted by Government or any officer of Government in his official capacity in a Mamlatdar's Court.

(N) "OTHERWISE THAN BY DUE COURSE OF LAW."

Section 9 of the Specific Relief Act (I of 1877) contains provisions similar to those of the present section. In *RUDRAPPA V. NARSINGRAO*, 7 Bom. L. R. 12, the Bombay High Court has decided that a thing is said to be done "*in due course of law*" when it is submitted to the consideration and pronouncement of the law, and the expression "*due course of law*" means the regular, normal process and effect of the law, operating on a matter which has been laid before it for adjudication. The expression "*due course of law*" must be read as referring to the process and operation of the law invoked by the ordinary method of a civil suit.

This construction is not found to lead to any result which can be called incongruous or unnatural; on the contrary, the result is natural and reasonable. For on the hypothesis which is a condition precedent to the operation of the section there is a dispute between two persons as to the right to the possession of immoveable property, and the Legislature in its anxiety to prevent agrarian crime may well have desired to enact that such a dispute should be settled exclusively by judicial decision, and not by either of the parties under whatever claim of title he may put forward; in other words it may well have been the intention that the person having a right to the possession of any immoveable property, should be debarred from taking the law into his own hands.

This view is corroborated by the provisions of section 22 of this Act, which says that the person against whom an order is passed by the Mamlatdar may bring a suit in a competent Civil Court to establish his title and recover possession upon the strength of it. So far, therefore, as the section itself is concerned, it would seem to look to possession alone and to provide that when such possession is to be recovered *ab invito*, recourse must be had to the legal proceedings and that where such proceedings are not taken, the person dispossessed may claim to be restored to possession, though such restoration shall not

affect the right of the person against whom an order is passed by the Mamlatdar to establish his claim in a separate suit.

In the following instances a person dispossessed of immoveable property cannot be said to be dispossessed otherwise than by due course of law:—

(a) The Civil Procedure Code (Act XIV of 1882) prescribes certain rules for the delivery of possession of immoveable property. Sections 263, 264 and 265 provide for the delivery of possession to a decree-holder. Section 335 awards possession under certain circumstances to a claimant other than a judgment-debtor. Sections 318 and 319 provide for the delivery of immoveable property to the purchaser at an auction sale held by a Civil Court.

(b) Under s. 9 of the Specific Relief Act (I of 1877) a plaintiff may obtain possession of immoveable property under the circumstances mentioned in that section.

(c) Under ss. 145 and 522 of the Code of Criminal Procedure (Act V of 1898) a Magistrate may dispossess a person of immoveable property in certain cases.

(d) Under s. 181 of the Bombay Land Revenue Code, after a sale of any occupancy or alienated holding has been confirmed, the Collector delivers the possession of the land included in such occupancy or alienated holding to the purchaser.

(e) Under ss. 16 and 36 of the Land Acquisition Act (I of 1894), the Collector may take possession of land.

It is probable that a person *other* than the judgment-debtor may be dispossessed in execution of a decree of a Civil Court. But such a person cannot be said to be dispossessed otherwise than by due course of law. There is moreover a special remedy for him to regain possession provided in s. 332 of the Civil Procedure Code. Consequently such a person cannot bring a possessory suit in a Mamlatdar's Court (a).

(a) RAMCHANDRA SUBRAO v. RAVJI VITHU PARIE, I. L. R. 20 Bom. 351; S. C. Prin. Judg. for 1895, p. 140; MANKCHAND KISANDAS v. DAJI RAMCHANDRA, Prin. Judg. for 1896, p. 665; RAMJI v. YASHWADA, Prin. Judg. for 1878, p. 56; G. LABBHAI v. JINABHAI, Prin. Judg. for 1888, p. 133; MAGAN v. VITHAL, Prin. Judg. for 1890, p. 159; MANIKCHAND v. DAJI, Prin. Judg. for 96, p. 665.

If a *third* person, who is not a party to a Mamlatdar's decision, is dispossessed in execution of that decision, he is dispossessed otherwise than by due course of law, and he can recover possession by a suit under the Mamlatdars' Act (a).

In a regular suit to recover possession of immoveable property, or any interest therein, on the strength of title, a Civil Court can go into the question of title, and can therefore confirm the possession in him who has the title, though the possession may have been obtained irregularly. But in such a case if a Mamlatdar, who cannot inquire into the title, find that the possession was obtained by the defendant otherwise than by due course of law, he will be bound to award possession to the plaintiff although he has no title.

[*Mamlatdar's finding as to possession—Magistrate's finding as to possession—Code of Criminal Procedure, 1872, S. 530—Actual possession—Dispossession—Cause of action—Res Judicata.*] L. who held a mortgage of the land from A filed a suit against him for possession of land as mortgagee, and obtained a decree awarding such possession in 1871. When L. was taken to receive possession, he was not put into possession by immediately ousting the tenant, but was told by the officer of the Court to enter after the crop was removed. L. afterwards did enter. In 1874 a First Class Magistrate confirmed his possession. Subsequently A filed a possessory suit before a Mamlatdar, who decided against L. and ousted him from possession in 1877. Whereupon L. sued A for possession. On an application for a review of the judgment passed by the High Court on second appeal, West J., in delivering the judgment of the Court said:—Lillu stands now in this position, that he has a decree for possession as mortgagee, and an order of a Magistrate in 1874 pronouncing him in possession; while, by a Mamlatdar's order of 1876, Annaji was declared to be in possession, and Lillu was thus driven to his present suit in the Civil Court. By an express provision of the Mamlatdar's Act, the decision of the Mamlatdar is not conclusive as to the point of actual possession in any subsequent suit. The decision of a Magistrate under the Code of Criminal

(a) *NINGAPPA v. ADYEPPIA*, I. L. R. 24 Bom. 397; *KASAM SAHEB v. MARUM*, I. L. R. 13 Bom. 552; *CHINAYA v. GANGAYA*, I. L. R. 21 Bom. 75.

Procedure is conclusive as to the possession ; but it is contended that a possession available to Lillu for perfecting his title under the decree must have been a peaceable possession, and that the dispute before the Magistrate in 1874 implies that his possession was not a peaceable one. As to this, the general principle is that a man who acquires possession is remitted, as it is said,—that is, he may rely for the support of his possession on any still subsisting title vested in him, and for which a legal remedy is still open to him (1) : *BRASSINGTON v. LLEWELLYN* (2). Of two persons entering simultaneously, the English law assigns possession to him that has the right, by a rule identical in substance with that of the Hindu law on the same subject (3). Consistently with this a person having a right to possession may enter peaceably, and may then maintain the possession thus acquired : *TAYLOR v. COLE* (4). This, as Lord Kenyon said, " will not break in upon any rule of law respecting the mode of obtaining the possession of lands " (5). If there is a breach of the peace in attempting to take possession, that affords a ground for a criminal prosecution, and, if the attempt is successful, for a summary suit also for a restoration to possession under s. 9 of the Specific Relief Act of 1877—*DADABHAI NARSIDAS v. THE COLLECTOR OF BROACH* (6) ; but an unlawful act in entering does not make the owner a trespasser *ab initio* (7) : the law will still annex the right to the possession. In *DOE DEM. STEPHENS v. LORD* (8) a mortgagee, whose writ of possession was set aside as irregularly obtained, was ordered to restore the possession he had acquired under it. It was declared an abuse of the process of the Court that the mortgagee should have entered with an appearance of

(1) *Ooke Lit.* 349a.

(2) 27 L. J. Ex. 297.

(3) *Perkins Proof Bk.*, 213, *Narada I* ; 4 ; 12, 13.

(4) 1. S. L. C., (6th Ed.) 115, So also *BRINSMEAD v. HARRISON*, L. R. 7 C. P. 547. Ex. parte Drake, L. R. W. N. for 1877, p. 119.

(5) See 3 T. R. at p. 295.

(6) 7 Bom. H. C. Rep. A. C. J. 82.

(7) I Hilliard on Torts, p. 600. See 1 and 2 Vic. c. 74, sec. 6. That a landlord entering by force is answerable for an injury to the tenant's property, see *BEDDALL v. MAITLAND*, L. R. W. N. for 1881, p. 43.

(8) 7 A. & E. 610.

authority to which he was not really entitled (9). A similar principle is involved in the case of SAYAD NASRUDIN v. VENKATESH PRABHU (10). If, therefore, there was on Lillu's part an abuse of the process of the Court in obtaining the possession which he was found to have in 1874, he would not probably be allowed to benefit by that possession. But what occurred was merely this, that, having what was equivalent to a writ of possession, he was not put into possession by immediately ousting the tenant, but was told by the officer of the Court to enter after the crop was removed. If he did enter afterwards, his entry could not be deemed an unlawful one ; he would be doing only what he had a right to do, and what the officer, if present, would have compelled his adversary to submit to. If he used violence, the person injured should have prosecuted him ; if he, notwithstanding the decree, took possession otherwise than "in due course of law," the person dispossessed should have sued him on this ground. *Prima facie*, his possession was justified ; it fulfilled the decree of 1871, and completing his right, gave him a new action if he was again dispossessed. Now the Magistrate in 1874 adjudged that Lillu was in possession, and gave, or secured, him possession even if he had it not before. There may have been a dispute down to that time ; but then, at any rate, Lillu's possession could no longer be called unlawful. It was a lawful possession until Lillu should be "ousted in due course of law" ; and a possession already decreed to him by the Civil Court. Any mere irregularity on the part of the Magistrate would not prevent the legal consequences, for he had authority to determine the question of possession, and his order has never been set aside. It was not like the case of an authority being revoked and exercised which did not legally subsist, and which, therefore, coerced the defendant by an unlawful compulsion ; nor was it an order like that of the Mamlatdar, expressly deprived of effect for the purposes of any ulterior proceedings on the question of possession. A proviso to that effect is annexed to section 534 of the Code of Criminal Procedure, but not to section 530 ; and the Magistrate's inquiry is a judicial proceeding binding for its intended purpose, even though the reasons for the order should be weak and insufficient. There was, thus, nothing to prevent the possession acquired by

(9) See A. & E., pp. 613, 614.

(10) I. L. R., 5 Bom. 382.

Lillu from adhering to his right under the decree. The fact subsisted ; and its results were not vitiated by any mis-conduct on his part. His supposed admission in 1876, that he had not acquired possession, turns not to be well founded. He says, or seems to say, that he did not at once get possession under his decree ; but he says also that he was told to go in and take possession, and that, in fact, he is in possession. There is thus nothing conclusive to set against the Mamlatdar's jurisdiction in his favour.—*LILLU v. ANNADI*, I. L. R. 5 Bom. 387 ; S. C. Prin. Judg. for 1881, p. 64.

[*Possession taken by rightful owner without Court's intervention—Trespass—English law—Indian law.*] In Pollock on Torts, p. 312, the English law on the effect of possession obtained by the true owner by peaceful or forcible entry is stated after an examination of the somewhat conflicting authorities to be that the possession of a rightful owner gained by forcible entry is lawful as between the parties, but that he may be punished for the breach of the peace by losing it, besides paying a fine to the king. This latter part of the law is the result of the Statute of 5 Richard II to which we have nothing corresponding in this country. The Indian Legislature has, however, provided for the summary removal of any one who dispossesses another, whether peaceably or otherwise than by due course of law ; but subject to such provision there is no reason for holding that the rightful owner so dispossessing the other is a trespasser, and may not rely for the support of his possession on the title vested in him, as he clearly may do by English law. This would also appear to be the view taken by West, J., in *LILLU v. ANNADI* (I. L. R. 5 Bom. 387, 390, 391).—*BANDU v. NABA*, I. L. R. 15. Bom. 238 ; S. C. Prin. Judg. for 1890. p. 283.

[*Mortgage—Suit for redemption—Ouster by defendant under Mamlatdar's order—Rightful owner—Trespass—Limitation.*] In 1889 the plaintiffs brought a suit to redeem certain land, mortgaged with possession to defendant in April or May 1877 for a period of nine years, alleging that at the expiry of that term, the said land was restored to them by defendant, who, however, again obtained possession under an order of the Mamlatdar's Court, dated 15th July 1886. Defendant denied having held the lands in mortgage from the plaintiffs, and contended that he had purchased the same on the 7th July 1877 from plaintiff No. 1. He also contended that the suit was time-barred. The Subordinate Judge held

that neither the mortgage alleged by plaintiffs nor the sale set up by defendant was proved : and that the suit was not time-barred as defendant's possession was from 1878 only. He awarded plaintiff's claim, holding that as defendant had admitted plaintiff's title, plaintiffs must succeed unless defendant proved the sale set up by him. On appeal the District Judge found that the suit was time-barred, as plaintiffs had not shown that they were in possession within 12 years before the institution of the suit in 1889. On second appeal to the High Court it was held that the proceedings taken by defendant in the Mamlatdar's Court showed that the plaintiffs had got into possession sometime in 1886 : and if they had the title to the land when they obtained such possession the decision in *BANDU v. NABA* (I. L. R. 15 Bom. 241) shows that they could rely on it in support of their ownership. The vital question therefore was as to the title of defendant as the alleged purchaser from the plaintiffs.—
DALLEWA KOM HUSSEIN SAHEB v. PARAPPA BIN BHARMAPPA,
Prin. Judg. for 1893, p. 335.

[*Suit by a trespasser to recover possession—S. 9, Specific Relief Act (1 of 1877)—S. 4, Bombay Mamlatdars' Act (III of 1876).*] The plaintiff, Amirudin, sued under the above section to recover possession of a certain room from the defendant. He alleged that up to the 3rd June, 1890, he had been in possession of the room. The defendant answered that the room was his and had been in his possession and not the plaintiff's, that the plaintiff had committed a trespass by excluding him from the room and putting a padlock on the door, and that he (the defendant) had subsequently removed the padlock and resumed possession. He contended that the plaintiff was a mere trespasser, and, as such, was not entitled to bring a suit for possession under S. 9 of the Specific Relief Act.

The Subordinate Judge was of opinion that the plaintiff's possession previous to his dispossesssion by the defendant was not that of a trespasser, but he submitted the following question for the opinion of the High Court :—

Whether it was competent for a defendant, in a suit instituted under section 9 of the Specific Relief Act or under Bombay Act III of 1876, to show that the plaintiff's possession previous to dispossesssion was that of a trespasser ?

SARGENT, C. J. :—The reference in this case raises a question

of some importance on the construction of section 9 of the Specific Relief Act. The defendant's case is that he had been in possession of the room in question, and that about 30th May, 1890, the plaintiff put a padlock on the room and went to Bombay, and that as he, the defendant, wanted the use of his room, he removed a window two days afterwards and effected an entrance. The question is whether, assuming the defendant's story to be true, the plaintiff's possession is such as to enable him to avail himself of the above section.

In *DADABHAI NARSIDAS v. THE SUB-COLLECTOR OF BROACH* (7 B. H. C. R. A. C. J. 82), Mr. Justice MELVILL expressed an opinion that a mere trespasser could not succeed under section 15 of Act XIV of 1859, the language of which is virtually the same as that of the section under consideration, on the ground that the plaintiff in such a case has not acquired juridical possession and, therefore, could be dispossessed. We think this is the correct view of the section, and it is quite consistent with the remark in *KRISHNARAO YASHVANT v. VASUDEV APPAJI GHOTIKAR* (I. L. R. 8 Bom. 371) as to the general object of the Act. It is further in accordance with the remarks of the Court in *VIRJIVANDAS MADHAVDAS v. MAHOMED ALIKHAN IBRAHIMKHAN* (I. L. R. 5 Bom. 208). Therefore, in the present case, assuming the defendant's statement is true, (as to which we express no opinion), even if the plaintiff can be said to have been in possession by what he did, still such possession not having been acquiesced in by the defendant, never became a juridical possession which could give him the right to invoke the aid of the Mamlatdar or the Court under section 9 of the Specific Relief Act.—*AMIRUDIN v. MAHAMAD JAMAL*, I. L. R. 15 Bom. 685; S. C. Prin. Judg. for 1891, p. 69.

[*Execution of Civil Court's decree—Dispossession of third party—Possessory suit by third party—Jurisdiction.*] V, a tenant of M's judgment-debtor, who was dispossessed in execution of a decree obtained by W, sued W in the Mamlatdar's Court. It was held that as V was not dispossessed otherwise than by due course of law, he had no cause of action.—*MAGAN MANIKCHAND GUJAR v. VITHAL VALAD HARI*, Prin. Judg. for 1890, p. 159.

[*Dispossession of person in execution of Civil Court's decree—Misrepresentation of Decree-holder and Purchaser—Obstruction to possession by defendant.*] B had obtained a decree against S, the widow and heir of the plaintiff's husband's brother, and in execution

sold certain immoveable property including a thikan, which was in plaintiff's possession, to the defendant, a karkun of the said B, possession having been delivered to him by the Court's bailiff. The plaintiff brought this suit in the Mamlatdar's Court claiming that the thikan was in her possession and that the defendant caused her obstruction. The Mamlatdar awarded the claim. *Iteld*, declining to interfere with the decision, that there were circumstances in the case which made it doubtful whether the process of the Court under which the defendant was alleged to have been put into possession was not obtained by misrepresentation. *RAMJI v. YASWADA* (Prin. Judg. for 1878, p. 56) and *GULABBHAI v. JINABAI* (I. L. R. 13 Bom. 213), refererd to.—*VINAYAK NARAYAN v. JANKIBAI*, Prin. Judg. for 1894, p. 195.

[*Execution of Civil Court's decree—Dispossession of a third person—Possessory suit by third person against decree-holder—Jurisdiction.*] Ramchandra obtained a Civil Court's decree against R S and another for partition of certain lands and recovery of possession of a third share therein, and in execution of that decree recovered possession through the Collector of Belgaum. The opponent Ravji then brought a possessory suit against Ramchandra in the Mamlatdar's Court, alleging that he had been in possession and enjoyment of the lands for many years, and that Ramchandra wrongfully obstructed his enjoyment thereof. He prayed for the removal of the obstruction. The Mamlatdar awarded the claim and passed a decree for the plaintiff. Ramchandra then applied to the High Court under its extraordinary jurisdiction. The case was argued before a Division Bench and the following questions were referred to a Full Bench :—

1. Whether a delivery of possession in execution of a decree for partition has the effect of dispossessing a third person not a party to the suit who was previously in possession and was not present when the delivery took place ?
2. If so, whether such dispossession constitutes a cause of action under the Mamlatdars' Act ?

The judgment of the Full Bench was delivered by—

SARGENT, C. J. :—The delivery of possession, which is directed to be given by S. 263 of the Civil Procedure Code, contem-

plates the decree-holder being placed in actual possession, and the language of S. 332 of the Civil Procedure Code shows that the possibility is assumed that in effecting such delivery a third person may become dispossessed, by which must be understood that such a state of things may have occurred as would amount to his dis- possession in the eye of law, or what is sometimes called juridical dis- possession. The mere formal delivery of possession, which consists in the reading by the officers on the land of the order for putting the decree-holder in possession and taking a receipt from him, cannot of itself effect such dis- possession. Whether what occurs on the occa- sion of giving such formal delivery has that effect, is a question of law and fact ; but it is clear, we think, on the authorities, that there is no dis- possession in the eye of the law, unless the deprivation of possession is complete as a fact, a conclusion which the Court has to form on the whole of the evidence—See Lindley's Jurisprudence, p. cxxiii—although what may occur may amount to a disturbance or obstruction of possession.

Again he who occupies land in the absence of the possessor does not, according to Savigny, "at the moment acquire juridical possession." Savigny, p. 261. In other words, it must be followed up by other acts of possession of which the third party has notice. This would seem to afford the only possible answer to the abstract question referred to us ; for as regards a third person—assuming, as we do, that he was not affected by the decree—it cannot matter that the decree was in a partition suit. In *RAMAJI GOVIND v. YASWADA* (P. J. for 1878, p. 56), it is quite possible that the Court considered the third person was present and did not obstruct.

With respect to the second question, we are of opinion that, in the case of dis- possession of a third party in execution of a decree, S. 332 of the Code of Civil Procedure applies, and that it does not constitute a cause of action within the jurisdiction of the Mamlatdar.—*RAMCHANDRA SUBRAO v. RAVJI BIN VITTU PARIT*, I. L. R. 20 Bom. 351 ; S. C. Prin. Judg. for 1895, p. 140.

[*Possession obtained through Civil Court—Suit to oust the person in possession.*] A Mamlatdar has no jurisdiction to oust a person placed in possession in execution of a decree of a Civil Court. The remedy of the plaintiff who is ousted improperly is by complaint to the Civil Court and not to the Mamlatdar.—*MANIKCHAND KISANDAS v. DAJI RAMCHANDRA*, Prin. Judg. for 1896, p. 665.

[*Tenant holding over—Dispossession by landlord—“Otherwise than by due course of law”*—*Specific Relief Act (I of 1877), s. 9—Construction.*] The plaintiff instituted a suit in the Court of the Joint Subordinate Judge of Dharwar to recover possession of certain land under s. 9 of the Specific Relief Act. The defendants produced a rent note signed by the plaintiff which satisfied the Sub-Judge that the plaintiff was the defendants' tenant holding over after the expiry of the period of tenancy. The Subordinate Judge dismissed the suit, holding that the plaintiff was rightly dispossessed.

On application under s. 622 of the Civil Procedure Code the High Court decided as follows:—

A tenant holding over is a tenant on sufferance, but he is not liable to be evicted by the landlord *proprio motu*: Whether he is so liable or not depends precisely upon the intention of the Legislature in framing s. 9 of the Specific Relief Act and no fair presumption as to that intention can be collected from the law prevailing in England. It may be doubted whether the holding-over is sufficient to make the tenant's possession “wrongful” within the ordinary acceptation of that word, and that such possession is still juridical possession seems apparent from the fact that a tenant holding over could recover as against a third party who unlawfully dispossessed him.

To read the words “due course of law,” used in s. 9 of the Specific Relief Act, as merely equivalent to the word “legally” is to deprive them of a force and a significance which they carry on their very face. For a thing, which is perfectly legal, may still be by no means a thing done “in due course of law”; to enable this phrase to be predicated of it, it is essential, speaking generally, that the thing should have been submitted to the consideration and pronouncement of the law, and the “due course of law” means the regular, normal process and effect of the law operating on a matter which has been laid before it for adjudication. That is the primary and natural meaning of the phrase, though it may be applied in a secondary sense to other proceedings held under the direct authority of the law. In s. 9 of the Specific Relief Act the words “due course of law” must be read in their primary sense as referring to the process and operation of the law invoked by the ordinary method of a civil suit.—*RUDRAPPA v. NARSINGRAO*, 7 Bom. L. R. 12.

(O) "BY REASON OF THE DETERMINATION OF
ANY TENANCY, OR OTHER RIGHT OF ANY
OTHER PERSON IN RESPECT THEREOF."

The first paragraph of this section gives the Mamlatdar jurisdiction not only in cases where the plaintiff has been dispossessed or deprived of possession otherwise than by due course of law, but also in cases in which the plaintiff "shall have become entitled to the possession or restoration thereof by reason of the determination of any *tenancy* or other right of any other person in respect thereof." Thus, a landlord is entitled to possession on the determination of a tenancy, whether he is the owner of the land or is a mortgagee in possession. It is clearly equitable that a mortgagee, who has obtained possession and has let out the land to a tenant, should, whether that tenant is the original mortgagor or not, be entitled to the same relief if the tenant tries to keep him out of possession after the tenancy has expired, as would be accorded to any other landlord.

But this summary relief is to be given only to persons entitled to possession on the determination of a tenancy or of any other right, and the phrase "any other right" must be construed as referring only to other rights *eiusdem generis*, i. e., of the same nature as a tenancy, on the maxim *noscitur a sociis* i. e., interpretation must be guided by associated words in the context (a). Another maxim of law, applicable in such cases is *verba generalia restringuntur ad habilitatem rei vel personæ*, i. e., general words may be aptly restrained, according to the matter or person to which they relate (b).

If, therefore, a mortgagee, never having obtained possession, though the terms of his mortgage purport to give him either immediate or contingent right to obtain it, allows the mortgagor to remain in possession on condition that the mortgagor shall pay certain annual interest, claims to oust the mortgagor on his failure in performance of such condition, the

(a) Maxwell's Interpretation of Statutes, 4th Ed., pp. 489 and 491.

(b) Broom's Legal Max. 7th Ed., p. 485.

Mamlatdar would be justified in refusing to exercise jurisdiction under this section. For in such case it might be held that the mortgagee was not "entitled to possession" merely by reason of the *determination* of some other right (resembling that of a tenant) in the mortgagor, but rather by reason of the accrual of some new right to the mortgagee which might be satisfied by other relief.

At present the law of landlord and tenant is contained in Chapter V of the Transfer of Property Act (IV of 1882). This Act was passed on 17th February, 1882, but under the provisions of s. 1 it was extended by the Bombay Government to this Presidency on the 1st of January, 1893 (a).

Before this Act was made applicable to this Presidency, there was no statutory law on the subject of tenancy. Therefore under s. 26 of Regulation IV of 1827 the law to be observed was the usage of the country in which the suit arose; if none such existed, the law of the defendant; and in the absence of specific law and usage, justice, equity and good conscience alone. The Calcutta High Court has held that the rules applicable to the relation of landlord and tenant in England are applicable to India, whenever no precise rule regarding the subject is to be found in Hindu or other laws (b).

The relationship of landlord and tenant for *agricultural* purposes is dealt with by the Bombay Land Revenue Code (Bombay Act V of 1879), ss. 83 and 84; the former contains provisions regarding the amount of rent payable by tenant, duration of tenancy and presumption as to tenure; and the

(a) Notification, dated the 27th October, 1892, by the Government of Bombay.

(b) TAR'CHAND BISWAS v. RAM GOBIND CHOWDHRY, I. L. R. 4 Calc. 781. See also RUSSICKLOLL MUDDUK v. LOKENATH KURMOKAR, I. L. R. 5 Calc. 688; S. C., 5 O. L. R. 492. See also DADA HONAJI v. BABAJI JAGUSHE, 2 B. H. C. R. 38; WEBBE v. LESTER, 2 B. H. C. R. 55; MITHIBAI v. LIMJI NOWROJI BANAJI, I. L. R. 5 Bom. 506 at 521; In the matter of SAITHRI, I. L. R. 16 Bom. 307 at 323; SHIVRAO v. PUNDLIK, I. L. R. 26 Bom. 437 at 441; CHINILAL VITHALDAS v. FULCHAND, I. L. R. 18 Bom. 160 at 170.

latter contains provisions as to the termination of *annual tenancy*.

No lease executed by a person who is an agriculturist within the meaning of s. 2 of that Act and who is residing in any local area for which a village-registrar has been appointed shall be admitted in evidence, for any purpose by any person having by law authority to receive evidence, or shall be acted upon by any such person or by any public officer, unless such instrument is written by, or under the superintendence of, and is attested by a village-registrar (a). Registration under that Act is to be deemed equivalent to registration under the Indian Registration Act, 1877 (b).

Tenancy (c).

A *lease* of immoveable property is a transfer of a right to enjoy immoveable property for a fixed term or in perpetuity either for a premium, or for rent, or both for a premium and for rent.

The transferor is called the *lessor*, the transferee is called the *lessee*, the price is called the *premium*, and the money, share, service or other thing to be so rendered is called the *rent*.

The interest acquired by a tenant in the land transferred to him is called his *tenancy*. Tenancy may arise by an agreement express or implied. It does not arise by trespass.

[*Encroachment by a tenant—Position of such tenant.*] When a tenant encroaches upon the land of his landlord, he does not by such encroachment become the tenant in respect of the land encroached upon against the will of the landlord.—PROHLAD TEOR v. KEDARNATHA BOSE, I. L. R. 25 Calc. 802.

(a) See s. 56 of the Deccan Agriculturists' Relief Act, 1879 to 1902.

(b) See s. 60, *Ibid.*

(c) Chapter V of the Transfer of Property Act (IV of 1882), which contains the law of landlord and tenant, does not apply to leases for agricultural purposes, since the Bombay Government has not declared these provisions to be applicable to the Presidency of Bombay, as required by s. 117 of that Act.

In many cases, where no express contract of letting has been made, a tenancy may be implied from the acts of the parties, especially the occupation and payment of rent (a).

A lease, underlease or sublease must be duly *stamped* according to the Stamp Law which might be in force at the time when and at the place where the lease was executed (b).

A lease must be duly *registered* according to the Law of Registration which might be in force at the time when and at the place where the lease was executed.

Under s. 17 cl. (d) of the Indian Registration Act (III of 1877), leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent, must be registered.

Nature of tenancy.

A tenancy may be (1) *at will*, (2) *from year to year*, (3) *for a fixed term*, (4) *by sufferance*, or (5) *perpetual*.

(1) Tenancy at will.

A tenancy *at will* is where lands are let by one man to another, to hold at the will of the lessor ; in this case the lessee is called *tenant at will*, because he has no certain or sure estate, for the lessor may put him out at any time he pleases. Either party may at any time determine a strict tenancy *at will*, although expressed to be held *at will* of the lessor only, unless the law requires a notice to quit to be given. A mere permission to occupy land constitutes a tenancy *at will* only. The words " I give you a close to enjoy as long as I please, and to take again when I please, and you shall pay nothing for it," create a tenancy *at will*. If a tenant whose lease has expired be permitted to continue in possession pending a treaty for a further lease, he is not a tenant *from year to year*, but a tenant *strictly at will*. If a man enter under a void lease, he is not a disseisor, but a tenant *at will*, under the terms of the lease in all other respects except the duration of time (c).

(a) Woodfall's Landlord and Tenant, Chapter VI.

(b) As for the present law see Art. 35 Sched. I of the Indian Stamp Act (II of 1899).

(c) Woodfall's Landlord and Tenant, Chap. VI, Sec. 4.

An estate at will may be determined by a demand of possession, or by the express declaration of either of the parties or by implication of law : of the latter description will be the death of either party, which in general determines the will, acts of ownership exercised by the landlord, his alienation of the reversion and notice thereof, waste committed by the tenant, his demising or leasing or assigning the premises over, or, in short, doing any act which is inconsistent with an estate at will. An entry by the landlord on the land without the tenant's consent, and cutting and carrying away stone therefrom, amounts to a determination of the will. It is requisite that the landlord should give the tenant notice that he determines the tenancy if the act relied on be done off the premises. Where the act is done on the land, it is presumed that the tenant is there and knows of it. The will is also determined by an agreement by the lessor for the sale of the property to the tenant at will. The words "unless you pay what you owe me, I shall take immediate measures to recover possession of the property," addressed to the tenant by the party entitled to ownership, are sufficient determination of the will, and equivalent to a demand of possession, so as to maintain ejectment. A sub-demise or assignment by a tenant without notice thereof to his landlord does not determine the will, so as to prejudice the landlord. If two joint tenants create a tenancy at will at a certain rent and one dies, the survivor takes the whole premises and may maintain an action for the entire rent against the lessee continuing in possession. The sudden determination of the will of one party will not operate to the material injury of the other : therefore if a tenant at will sow his land, and the landlord determines the tenancy before the corn be ripe, the tenant notwithstanding has free liberty to enter upon the land to cut and carry his crop ; and on a like principle of justice, the tenant may, in all cases, have reasonable time allowed him to remove his goods after the determination of the estate by the act of the landlord.

(2) **Tenancy from year to year.**

A tenant from year to year is one who holds under a

demise (express or implied) for a term, which may be determined at the end of the first or any subsequent year of the tenancy, either by the landlord or the tenant, by a regular notice to quit. He is substantially a tenant at will ; except that such will cannot be determined by either party without due notice to quit. If no such notice be given, the tenancy will continue from year to year for any number of years until surrendered, or extinguished by the statute of limitations, or the lessor's title ceases. The death of either party will not determine it, unless the lessor be tenant for his own life only, and the lease is not made pursuant to any statute or power.

Leases from year to year give only one time of continuance. That time, however, may be confined to one year, or extended to several years, according to circumstances attending the tenancy in its progress. In the first place, the lease is for one year certain, and after the commencement of every year, or perhaps after the expiration of that part of the year in which a notice of determining the tenancy may be given, it is a lease for the second year ; and in consequence of the original agreement of the parties, every year of the tenancy constitutes part of the lease, and eventually becomes parcel of the term : so that a lease, which in the first instance is only for one year certain, may in the event be a term for one hundred years or more. Under this species of tenancy the law considers the lease as a lease from year to year.

Where parties mutually agree for a tenancy "from year to year" and possession is taken, such a tenancy is thereby created, and may be determined at the end of the first or any subsequent year of the tenancy by a regular notice to quit. But where a tenancy is created "for one year certain, and so on from year to year" (which is frequently done by mistake), it enures as a tenancy for two years at the least, and cannot be determined at the end of the first year. It may, however, be determined by due notice to quit at the end of the second or any subsequent year of the tenancy. A demise "for a year," or "for one year certain," does not create a tenancy from year

to year, nor require any notice to determine it at the end of the year.

Where a person is let into possession under a mere agreement for a future lease (not amounting to an actual demise), or under a void lease, he becomes only a tenant at will; but when he pays, or expressly agrees to pay, any part of the annual rent thereby reserved, his tenancy at will changes into a tenancy from year to year, upon the terms of the intended lease, so far as they are applicable to and not inconsistent with a yearly tenancy. A stipulation for two years' notice to quit is inapplicable to such a tenancy.

Where a tenant for a term of years holds over after the expiration of his lease, he becomes a tenant on sufferance; but when he pays, or expressly agrees to pay, any subsequent rent, at the previous rate, a new tenancy from year to year is thereby created upon the same terms and conditions as those contained in the expired lease, so far as the same are applicable to and not inconsistent with a yearly tenancy. This, however, is a matter of evidence than of law. The landlord may, for instance, show that he accepted the rent from time to time under a mistake. Any such new tenancy (when implied) will be deemed to have commenced at the same time of the year as the original term and notice to quit should be given accordingly. Even if the rent be increased, the tenancy will be subject to covenants or stipulations similar to those contained in the former lease, unless others are expressly agreed on. It will also be subject to the custom of the country, so far as such custom is not excluded by the terms of the expired lease. It may be determined by notice at the end of the first or any subsequent year of the tenancy, or under an implied proviso for re-entry similar to that contained in the expired lease.

If whilst a tenant from year to year is in possession of lands under an agreement reserving a certain rent, he agrees with his landlord to pay an increased or reduced rent, this will not have the effect of then creating a new tenancy.

A demise by a tenant from year to year to another also

to hold from year to year, is in legal operation a demise from year to year only during the continuance of the original demise to the intermediate landlord.

An annual tenancy shall, in the absence of proof to the contrary, be presumed to run from the end of one cultivating season to the end of the next. The cultivating season may be presumed to end on the 31st March (a).

An annual tenancy shall require for its termination a notice given in writing by the landlord to the tenants, or by the tenant to the landlord, at least three months before the end of the year of tenancy, at the end of which it is intimated that the tenancy is to cease (b).

(3) **Tenancy for a fixed term.**

A lease for a fixed term is a contract for the exclusive possession of lands or tenements for some certain number of years or other determinate period (c).

Leases of immoveable property for any term exceeding one year, or reserving a yearly rent, must be registered (d). An agreement varying the terms of a registered lease, *e. g.*, abating the rent is not a fresh lease and does not require registration (e).

In the absence of any contract to the contrary, a lease for a fixed period expires at the end of the term, and does not require a notice to quit, unless the parties stipulate for it.

Where the time limited by a lease of immoveable property is expressed as commencing from a particular day, in computing that time such day shall be *excluded*. Where no day of commencement is named, the time so limited begins from the making of the lease.

(a) The Bombay Land Revenue Code (Bombay Act V of 1879, s. 84). (b) *Ibid.*

(c) Woodfall's Landlord and Tenant, Chapter V, Section 1.

(d) See s. 17 of the Indian Registration Act (III of 1877).

(e) SATYESH CHUNDER v. DHUNPUL, I. L. R. 24 Cale. 20.

Where the time so limited is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which such time commences.

Where the time so limited is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option (a).

(4) **Tenant by sufferance.**

A tenant on sufferance is one who entered by a lawful demise or title, and after that has ceased wrongfully continues in possession without the assent or dissent of the person next entitled; as where any one continues in possession without agreement, after a particular estate is ended. If a tenant for years surrenders and then hold over, he will be either tenant on sufferance or disseisor, at the election of the landlord. An under-tenant who is in possession at the determination of the original lease, and is suffered by the reversioner to hold over, is only a tenant on sufferance. Where a tenancy at will is determined by the landlord exercising acts of ownership, and the tenant remains in possession, he becomes tenant on sufferance only; but slight evidence would be sufficient to show a new creation of a tenancy at will, or he may by payment of rent or other acknowledgment of tenancy become tenant from year to year.

There is a great difference between a tenant at will and a tenant on sufferance; the former is always in by right; but the latter holds over by wrong after the expiration of a lawful title. A landlord may maintain ejectment against his tenant on sufferance without any previous demand of possession. A tenant on sufferance, who is turned out of possession by his landlord, without any demand of possession, cannot maintain ejectment, but may sometimes maintain trespass. A tenant on sufferance has no demisable estate, but he may create a tenancy by estoppel (b).

(a) The Transfer of Property Act, 1882, s. 110.

(b) Woodfall's Landlord and Tenant, Chapter VI, Section 5.

(5) Perpetual tenancy.

Perpetual tenancy is a tenancy for an indefinite period, and lasts so long as the relationship of landlord and tenant continues.

In India a lease may be perpetual. But in England it cannot be perpetual; but there must be a definite period of time fixed for the determination of the lease. It is, however, not to be supposed from this that a perpetual lease is unknown to English law. In England it is by means of successive covenants for renewal that a perpetual lease may be created (a).

In the Presidency of Bombay there are *mirasdars* or persons claiming perpetual tenancy, which is regulated by the usage or custom of the country. *Mirasi* right or perpetuity of tenure is, like other facts, susceptible of proof by various means (b).

[*Inamdar*—Uniform rent for 90 years.] Where a family of *kulkarnis* in the Konkan was proved to have been in actual occupation of land under an *Inamdar* for 90 years at a fixed rent : Held, that, in the absence of proof of a lease for a more limited term, it might be inferred that the land was demised on a perpetual lease, and that the defendants could not be ejected so long as they paid the usual rent.—*ANNAJI APPAJI v. KASI ATMAJI*, 3 Bom. H. C. R. A. C. J. 124.

[Admission of tenancy—Presumption of perpetual lease.] Although a person is admitted to have been in possession as a tenant for more than 30 years, yet the presumption of law is that he is only a tenant from year to year; and, therefore, unless there is evidence of strong counter-presumption of a perpetual lease, the proprietor can oust.—*BAI GANGA v. DULLABH PARAG*, 5, Bom. H. C. R. A. C. J. 179.

(a) *SEVENOAKS RAILWAY CO. v. LONDON CHATHAM AND DOVER CO.*, L. R. 11 Ch. D., 652.

(b) *ANNAJI v. KASI*, 3 Bom. H. C. R. A. C. J. 124; *BAI GANGA v. DULLABH*, 5 Bom. H. C. R. A. C. J. 179.

[*Perpetual tenancy—Long possession—Presumption—Bombay Land Revenue Code (V of 1879), s. 83—Burden of proof.*] The plaintiff's predecessor in title acquired the lands in dispute in A. D. 1780. The defendants were in possession as tenants. They proved their possession so far back as 1812. But it did not appear that they were put in possession first in that year. There was no evidence either of the commencement or of the duration of their tenancy. *Held* that, under s. 83 of the Bombay Land Revenue Code (Bombay Act V of 1879), the defendants' tenancy should be presumed to be perpetual, and that it lay on the plaintiff to prove the contrary.—DAULATA v. SAKHARAM GANGADHAR, I. L. R. 14 Bom. 392.

[*Long possession at an invariable rent—Tenure in property—Proof—Local usage or custom.*] A tenure in perpetuity cannot be established merely by evidence of long possession at an invariable rent, unless it appears that such tenancy may be so acquired by local usage.—NARAYANBHAT v. DAVLATA, I. L. R. 15 Bom. 647.

[*Tenancy not more than forty years old—Bombay Land Revenue Code (Bom. Act V of 1879), s. 83—Tenancy not permanent.*] Section 83 of the Bombay Land Revenue Code (Bom. Act V of 1879) is applicable only when the evidence as to the commencement and duration of the tenancy is not forthcoming by reason of its antiquity, which, in the case of a tenancy at most only forty years old, there is no reason for presuming will be the case.—KALIDAS LALDAS v. BHAIJI NARAN, I. L. R. 16 Bom. 646.

[*Tenancy forty years old—Evidence of commencement and origin of tenancy—Bombay Land Revenue Code (Bom. Act V of 1879), s. 83.*] Section 83 of the Land Revenue Code (Bom. Act V of 1879) does not apply to a tenancy which commenced about forty years ago, but it applies to a tenancy with respect to which there is no satisfactory evidence to show the commencement as well as the terms of the tenancy.—LAKSHMAN v. VITHU, I. L. R. 18 Bom. 221.

[*Permanent tenancy—Bombay Land Revenue Code (Bom. Act V of 1879), s. 83—Absence of local usage.*] The mere fact that a tenancy has commenced subsequently to the commencement of the landlord's tenure does not prevent the application of s. 83 (1) of the Bombay Land Revenue Code (Bom. Act V of 1879), in cases

where, by reason of the antiquity of the tenancy, no satisfactory evidence of its commencement is forthcoming. G held certain lands as a tenant under M, an inamdar. The lands continued in G's family for nearly 80 years. It was found that, owing to this antiquity of the tenancy, its commencement or duration could not be satisfactorily established by evidence. *Held* that in the absence of any local usage to the contrary, G's tenancy must be presumed to be permanent.—RAMCHANDRA NARAYAN MANTRI v. ANANT, I. L. R. 18 Bom. 433.

[*Rights of khata tenants—Evidence of similar tenants in similar villages.*] In determining the rights of khata tenants who held under no express contract, the best evidence, if possible, would be the evidence of custom in the particular village in question, but evidence of similar tenants in similar villages would not be excluded. Mirasdars in an inam village cannot always claim to hold at a fixed rent.—VISHWANATH BHIKAJI v. DHONDAPPA, I. L. R. 17 Bom. 475.

[*Perpetual lease—Possession for 43 years.*] The existence of a perpetual lease cannot be presumed merely from the fact that the tenant has been in possession at a uniform rent for 43 years.—Prin. Judg. for 1871, S. A. 242 of 1871, 11th Sep. 1871.

[*Permanent tenancy—Lease providing fixed annual rent—Payment of rental for many years.*] The mere circumstance that a lease provides for a fixed annual rent, and that for many years the fixed rental was alone levied is not sufficient to hold the lease as one for permanent tenancy in the absence of words of inheritance in the lease as well as anything in the circumstances under which it was made or the subsequent conduct of the parties, to warrant such construction.—RAMKRISHNA v. KESHO, Prin. Judg. for 1886 p. 61.

[*Permanent tenancy—Inequality of benefit.*] Where the lease did not contain the word "Mulgeni" nor any expression from which the intention to create a permanent tenancy could be distinctly inferred, and there was a clause allowing the tenant to surrender the land when he chose but there was a provision allowing the tenant to build a house and the tenant had held at a uniform rent for about thirty years; *Held* that there was no permanent tenancy created, the uniform payment of rent in the absence of an acknow-

ledgment of permanent tenancy by the landlord did not lead to that conclusion and that the condition about permission to build and to surrender the land showed a certain want of equality of benefit inconsistent with the theory of permanent tenancy.—**NAGAPAYA v. ANANTAYA**, Prin. Judg. for 1891, p. 248.

[*Perpetual lease.*] A sold a shop to B on the terms that he, A, should retain the ownership of the land below it, and receive a yearly rent of Rs. 5 in respect of it, and that if B erected another shop on the same land, he was to remain there as long as he liked, but that if B should no longer want it but wish to sell it, he should first offer it to A, and on his declining to buy might sell it to another or pull it down and remove the materials, restoring the land to A. *Held*, that this amounted to a lease in perpetuity of the land so long as the shop should be there.—**RAMCHANDRA v. TUKARAMSHET**, Prin. Judg. for 1884, p. 250.

[*Lease—Maphi Istawa.*] A *Maphi Istawa* lease by which, in consideration of the land being reclaimed at the lessee's expense, the lessee is to hold the land for 10 years free of assessment, and for the next 10 years at a gradually increasing assessment, and thereafter at a full assessment named, gives the lessee a right to hold in perpetuity, so long as he pays the full assessment.—**TULJAGIRI v. DHONDBHUT**, Prin. Judg. for 1873, 22.

[*Lease—Construction—“Nirantar.”*] In a district where Marathi and Kanarese are the prevailing languages, a lease of lands to be held *nirantar* must be taken to confer a perpetual interest.—**GANGAVA v. KONHER**, Prin. Judg. for 1876, p. 227.

[*Lease—Construction.*] A lease containing no words denoting permanency and not granted for building purposes or in contemplation of the lessee making repairs cannot be construed into a permanent lease. The provision that the lessee was to pay a certain rent from year to year creates only a yearly tenancy.—**KRISHNA v. LADU**, Prin. Judg. for 1893, p. 292.

Assignment of leases.

The transfer of the interest of a lessee may be by assignment or under-lease. As between the assignor and the assignee, the person, by whom the rent payable under the lease is to be paid is determined by the terms of the assignment; but the lessor has his remedy against either. The lessee remains liable.

to the lessor for the rent in spite of the assignment, unless the lessor agrees to take the assignee for his lessee and to discharge the assignor from his liability under the express terms of the lease (a). The lessee may, if he so choose, enforce the duties under the lease as against the assignee; or he may sue both together, but he can have execution against only one of them (b). The assignee is liable to pay the rent and perform the covenants under the lease to the lessor only so long as the land is in his possession. If he assigns it to another person, his liability ends from the date of the assignment. The liability which has accrued to such date is on the previous assignee.

Sub-lease.

An under-lease or a sub-lease is a lease of his interest or a part of it by the lessee to another person. As between the lessee and the underlessee, the person by whom the rent payable under the original lease is to be paid is fixed by the terms of the under-lease. The lessor, however, can enforce his claim against the lessee or the underlessee or both. An under-lease is avoided by the forfeiture of the original lease, unless the forfeiture has been relieved against or unless the forfeiture has been incurred fraudulently in order to avoid the under-lease (c).

A sub-lease differs from an assignment of lease, in that it creates no privity of contract between the sub-tenant and the landlord. The landlord has to deal with his lessee and not with the sub-tenants of the latter. A landlord putting an end, by proper notice, to the tenancy of his tenant thereby determines the estate of the under-tenants of the latter (d).

Determination of tenancy.

A lease of immoveable property determines :—

(a) Woodfall's Landlord and Tenant, Chapter VII, section 3: *SASHI BHUSAN v. TARA LAL*, I. L. R. 22 Calc. 494.

(b) *KUNHANCYAN v. ANJELU*, I. L. R. 17 Mad. 296.

(c) See also Transfer of Property Act (IV of 1882), ss. 114 and 115.

(d) *TIMMAPPA KUPPAYA v. RAMA VENKANNA NAIK*, I. L. R. 21 Bom. 311.

- (a) By efflux of the time limited thereby :
- (b) Where such time is limited conditionally on the happening of some event—by the happening of such event :
- (c) Where the interest of the lessor in the property terminates on or his power to dispose of the same extends only to the happening of any event—by the happening of such event :
- (d) In case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right :
- (e) By express surrender ; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them :
- (f) By implied surrender :
- (g) By forfeiture ; that is to say, (1) in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re-enter, or the lease shall become void ; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself ; and in either case the lessor or his transferee does some act showing his intention to determine the lease :
- (h) On the expiration of a notice to determine the lease, or to quit or of intention to quit, the property leased, only given by one party to the other (a).

Illustration to clause (f).

A lessee accepts from lessor a new lease of the property leased to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

(a) The Transfer of Property Act, 1882, s. 111. See also Woodfall's Landlord and Tenant, Chap. VIII.

A forfeiture under clause (g) is waived by acceptance of rent which has become due since the forfeiture, or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting :

Provided that the lessor is aware that the forfeiture has been incurred :

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver (a).

A notice given under clause (h), is waived, with the express or implied consent of the person to whom it is given, by any act on the part of the person giving it showing an intention to treat the lease as subsisting (b).

Illustrations.

(a) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) A, the lessor, gives B, the lessor, notice to quit the property leased. The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived.

If a lessee or underlessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or underlessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased (c).

(a) The Transfer of Property Act, 1882, s. 112. See Woodfall's Landlord and Tenant, Chap. VIII, section 5, Sub. s. (f).

(b) *Ibid.* s. 113. See Woodfall's Landlord and Tenant, Chap. VIII, s. 7, Sub. s. (f).

(c) The Transfer of property Act, 1882, s. 116. See Woodfall's Landlord and Tenant, Chap. VI, s. 2.

Illustration.

A lets a farm to B for the life of C. C dies, but B continues in possession with A's assent. B's lease is renewed from year to year.

[*Holding over—Conditions of tenure.*] Where on the expiration of a lease the lessor is allowed to continue in possession as a yearly tenant, he does so on the terms contained in the expired lease, so far as they are consistent with a yearly holding.—**SAYAJI v. UMAJI**, 3 B. H. C. C. J. 27.

[*Holding over—Notice to quit.*] A tenant holding over for some time without renewal of his lease is entitled, whether he has any right of occupancy or not, to retain possession of his tenure, until either he resigns it or is ejected in due course of law.—**OOMA LOCHUN MOJOOMDAR v. NITTYE CHUND PODDAR**, 14 W. R. C. R. 467. See also **CHATURI SINGH v. MAKUND LALL**, I. L. R. 7 Cale. 710; **S. C., 9 C. L. R. 240**; **RAMKHELAWAN SINGH v. SOONDRA**, 7 W. R. C. R. 152.

[*Kabulayat—Breach of condition—Determination of tenancy—Jurisdiction.*] Where the kabulayat provided for the immediate determination of the tenancy on the tenant failing to pay the rent for two successive years with interest during the intervening period, it was held by the High Court that S. 4 of Bombay Act III of 1876 gives the Mamlatdar power to give immediate possession when the plaintiff is entitled to the restoration of the lands by reason of the "determination" of any tenancy, which includes not only the expiry of the tenancy by efflux of time, but its determination by any other cause agreed upon by the parties at the time of creating the tenancy. The case was, therefore, sent back to the Mamlatdar with direction to proceed with the trial.—**SHRIDHAR NARAYAN v. BHAGVANT MAHADEV**, Prin. Judg. for 1882, p. 370.

[*Agreement creating tenancy—Determination of tenancy by efflux of time—Jurisdiction.*] Where the agreement between the parties created a tenancy for two years, at the expiration of which the plaintiff was entitled to possession, it was held that the Mamlatdar had jurisdiction and he was directed to hear the case and decide on it.—**BECHAR RANSETT GUJAR v. RAMA BIN LIMBAJI**, Prin. Judg. for 1885, p. 54.

[*Proper issue for trial—Possession of the Defendants—Lease—Determination of lease—Jurisdiction.*] Held that the

proper issue for trial was, whether the defendants were in possession of the lands in question by right derived from the plaintiff. As the defendant admitted that the other two defendants and her husband passed a rent note to the plaintiff, whatever question there might be between herself and the other two defendants as to whether there had been a partition between her husband and them, it only remained for the Mamlatdar to consider whether the suit was brought within 6 months of the expiration of the lease. As it was not disputed that the suit was in time, the Court directed the Mamlatdar to give possession to the plaintiff.—*NEMCHAND SAMCHAND v. DAYA BHANA*, Prin. Judg. for 1887, p. 105.

[*Monthly tenant—Failure to pay rent—Notice to quit—Determination of tenancy—Jurisdiction.*] Plaintiff presented a plaint, under Bombay Act III of 1876, to the Mamlatdar asking that he should be put in possession of a house which he had let by the month to Defendant, and alleging that defendant had failed to pay the rent, and that though he had given defendant a month's notice, defendant had not given up possession to him.

The Mamlatdar made the following order :—

“ Under S. 4 of Bombay Act III of 1876 this Court can entertain a suit only when the plaintiff has become entitled to recover possession by reason of the determination of the period or in other words by reason of the determination of the period or enjoyment. At the time when the house was let, no term was fixed. The period also was not fixed. The plaintiff subsequently fixed the period by giving a notice. Bearing in mind the meaning of the said section, it appears that the original transaction of giving and taking on rent should have taken place on an agreement for a fixed period and that if such a form is subsequently given, the matter then goes beyond the jurisdiction of this Court. As this matter, therefore, does not come within the jurisdiction of this Court pursuant to S. 10 of the said Act, the plaint is returned.”

On an application under extraordinary jurisdiction, the High Court passed the following—

Judgment.—The Mamlatdar would appear to have thought that the section only gave him jurisdiction when the tenancy expires by efflux of time, but the section gives him the power to give possession whenever the plaintiff is entitled to it by “ deter-

mination of the tenancy" whether by efflux of time or by any other cause arising from the contract between the parties. The Mamlatdar had, therefore, jurisdiction, and we direct him to proceed to dispose of the case on the plaint being again presented to him.—
SHITANATH GOPINATH v. KHANDERAO NARAYAN, Prin. Judg. for 1893, p. 24.

[*Vendor and Purchaser—Occupation by intending purchaser at a monthly rental pending settlement of terms and execution of conveyance—Neglect to pay rent and to complete purchase—Notice—Possessory suit.*] A, having agreed to sell his house to B for Rs. 500, the terms of the deed not being settled, permitted B to live in the house pending execution of the conveyance, B agreeing to pay rent in the meanwhile at the rate of Re. 1 per mensem. Difference having arisen as to the terms of the deed, A sent a written notice by an agent to B, requesting him to execute the conveyance in accordance with the draft deed which accompanied the notice, and to pay the purchase-money to the agent, or in default to vacate the house within 8 days. On a suit for possession by A against B—*Held*, that the arrangement between parties under which B took possession did not create a tenancy within the contemplation of S. 4 of Bombay Act III of 1876, and in any case the tenancy was not determined as the deed had not been executed.—KRISHNAJI RAMCHANDRA LIMAYE v. SATYABHAMABAI, Prin. Judg. for 1894 p. 116.

[*Delivery of possession in execution of a decree of Civil Court—Subsequent lease to the judgment-debtor—Expiration of the lease—Fresh cause of action.*] Vinayak obtained possession of land from Balu in execution of a decree of a Civil Court. After obtaining possession, Vinayak leased the land to Balu. On Balu's refusal to vacate the land on the expiration of the lease, Vinayak brought a possessory suit in the Mamlatdar's Court. The Mamlatdar rejected the plaint, holding that he ought not to order restoration of possession of the land again and again. *Held*, that a fresh cause of action accrued to Vinayak on the refusal of Balu to give possession on the expiry of the lease, and that the Mamlatdar was wrong in declining to accept the plaint.—VINAYAK VISHVANATH BHOPE v. BALU BIN BHUKU, I. L. R. 20 Bom. 491; S. C. Prin. Judg. for 1859, p. 174.

[*Lease—Death of lessee during the term—Possessory suit against lessee's heirs—Jurisdiction.*] If heirs succeed to their father's rights under a lease, the jurisdiction of the Mamlatdar in a suit for possession arises on the determination of that lease against such heirs as though the original tenant were then alive.—**AMAR-CHAND HINDUMAL v. SAVALYA**, I. L. R. 21 Bom. 738 ; S. C. Prin. Judg. for 1896, p. 122.

[*Dispossession of tenant—Possessory suit after expiration of tenancy—Landlord's right to bring possessory suit.*] Under a lease dated 30th July 1895, Ramabai let some land to Khandu to be held by the latter till the end of March 1896. On 24th March, 1896, Khandu gave the land to one Bhimrao who let it to Bhima. On the 2nd July Ramabai brought a possessory suit against Bhimrao and Bhima under Bom. Act III of 1876. The Mamlatdar awarded the claim holding that Ramabai was in possession within six months and that Khandu fraudulently transferred possession to Bhimrao on 24th March.

Against this decision the defendant applied to the High Court urging, *inter alia*, that the Mamlatdar had no jurisdiction to entertain the suit. *Held*, that as Khandu's tenancy expired on 31st March, he could not sue for possession in July. The plaintiff was entitled to possession on the 31st March on the expiration of Khandu's kabulayat, and was, when the suit was brought, also entitled to possession.—**BHIMRAO DESAI v. RAMABAI KOM SHRIPAT-RAO DESAI**, Prin. Judg. for 1896, p. 599.

[*Construction of Lease—Possession to be given back in a month means last day of month—Cause of action—Sunday, limitation when last day.*] When a lease says that possession is to be given back in a month, the whole of that month must be understood to have been intended to be included, and a suit in the Mamlatdar's Court to recover possession would be in time if brought within six months of the last day of the month, and if the last day on which the suit could be brought is a Sunday, it can be brought on the next following day.—**UMABAI v. DATTO BIN BAPU UGALE**, Prin. Judg. for 1898, p. 34.

[*Sale of land—Lease of land to vendor without vendee entering into the physical occupation of it—Determination of tenancy—Suit for possession by vendee.*] The defendants sold some land to the plaintiff, who without apparently entering into its physical occupa-

tion leased it to the defendants for five years which ended within six months of the plaintiff's suit for possession which he brought in the Mamlatdar's Court. The Mamlatdar of Satara held that the plaintiff never came into actual possession of the land leased under his sale and dismissed the suit. On an application by the plaintiff to the High Court under S. 622 of the Code of Civil Procedure it was held that the Mamlatdar improperly declined to exercise jurisdiction vested in him by law. The defendants, to use the exact language of S. 15 (b) of the Mamlatdars' Act, were at the time when the suit was brought "in possession of the property by a right derived from the plaintiff." And to that possession, to use the language of S. 4, the plaintiff had become entitled by reason of the determination of the defendant's tenancy.—**BALA BIN RAMJI v. MAHADU BIN SADU**, Prin. Judg. for 1898, p. 69.

[*Expiration of lease—Possessory suit—Possession of under-lessee.*] Plaintiff's mother leased the land to defendant No. 2 Perojshaw and one Camaji who afterwards sublet it to defendant No. 1. After the expiration of the term of the lease plaintiffs brought a suit to recover possession. The Mamlatdar rejected the claim for the following reasons :—

"There is no evidence to show that the defendant No. 2 is in possession of the land in dispute now. He says Camaji is in possession and therefore the suit must fail. Also the defendant No. 1 is not a tenant deriving his possession from Camabai or the plaintiffs and the suit cannot be against him."

The High Court held that an underlessee is to be regarded in possession by a right derived from his landlord's lessor.—**KASTURCHAND v. SRIRAM** (1 Bom. L. R. 71 followed).—**WAGHOJI v. SRIRAM WAGHOJI**, 4 Bom. L. R. 52.

[*Landlord and tenant—Determination of the tenancy—Trespass during the tenancy—Possessory suit against the tenants and the trespasser—Jurisdiction.*] The plaintiff let certain lands to the defendants Nos. 1 and 2 on the 5th June 1905. During the continuance of the tenancy the defendants Nos. 1 and 2 were dispossessed by Deu (defendant Nos. 3). The tenancy ended on the 6th June 1906. The plaintiff sued the defendants Nos. 1-3 in the Mamlatdar's Court at Niphad on the 29th October 1906. The defendant No. 3 contended that the suit having been brought more than six

months after her adverse possession began, the suit as against her was barred.

The defendant applied to the Collector of Nasik under s. 23 for revision, but the application was rejected.

On an extraordinary application the High Court passed the following judgment :—

" CHANDAVARKAR, J.—The suit was brought in the Mamlatdar's Court under cl. (b) of s. 19 of the Mamlatdars' Act. According to the finding of the Mamlatdar, the tenancy of defendants 1 and 2 which had commenced on the 5th of June 1905 expired on the 6th of June 1906 ; and the suit having been filed within six months from the latter date, the Mamlatdar had jurisdiction to take cognisance of it, so far as the cause of action affecting defendants 1 and 2, the tenants of the plaintiff, was concerned. But it is contended before us as it was before the Mamlatdar that he had no jurisdiction to try the suit so far as it affected defendant No. 3. Now the Mamlatdar has found that defendant No. 3 has been in possession of the land since November 1905. That defendant having gone into possession during the continuance of defendants 1 and 2's tenancy, the plaintiff could not have sued in the Mamlatdar's Court to oust her : GOMA v. NARSINGRAO, I. L. R. 20 Bom. 26. Defendants 1 and 2 could have sued, but if they were unwilling, the plaintiff according to the decision just cited had no alternative but to wait until the tenancy expired. Under these circumstances the law must be construed so as to prejudice no party situated as the plaintiff in the present case is. The Mamlatdars' Act is a remedial measure and must be liberally construed so as to advance the remedy. And we think in a case of this kind the plaintiff's remedy being to bring his suit under cl. (b) of s. 19 on the expiry of the tenancy, the fact that a trespasser (which defendant No. 3 must for the purposes of this case be held to be) got into possession during the continuance of the tenancy, but more than six months before its determination, is not sufficient to oust the Mamlatdar's jurisdiction. The trespass was on the tenancy, and must stand or fall with it, because the plaintiff could not have assailed it in the Mamlatdar's Court so long as the tenancy was in force. And it must be held on a proper construction of the object and policy of the Mamlatdar's Act, that a trespasser like defendant No. 3 cannot defeat the right of the landlord to recover immediate possession of the land on the determination of defendants Nos. 1 and 2's tenancy

by resorting to the summary remedy given by the Act. The rule is discharged with costs."—**DEU DADA GAULI v. SITARAM CHIMNAJI**, 9 Bom. L. R. 1179.

Editor's note.—Sometimes the governing principle of the remedial enactment has been extended to cases not included in its language, to prevent a failure of justice, and consequently of the probable intention.—Maxwell's Interpretation of Statutes, 4th Ed., p. 115.

Strictly speaking the plaintiff in such a case ought in the first instance to bring a suit against the Defendants Nos. 1 and 2 under s. 5 and then he should apply to the Mamlatdar to add the Defendant No. 3 under s. 18 sub. s. (2).

Notice to quit.

A notice to quit is a certain reasonable notice required by law, or by custom, or by special agreement, to enable either the landlord, or tenant, or the assignees or representatives of either of them, *without the consent of the other*, to determine a tenancy from year to year, or from two years to two years, or other like indefinite period. Without such notice, or an actual or implied surrender or merger, a tenancy of the above nature would continue in the tenant and his assigns or representatives; and the immediate reversion would continue in the landlord and his assigns or representatives, until extinguished by the Statute of Limitations (a).

The right to determine a tenancy from year to year by a notice to quit is a *necessary incident* to such tenancy. A stipulation against any such notice being given by one party or by the other is repugnant to the nature of the tenancy, and therefore void, and mere surplusage (b).

Upon the expiration of a notice to quit duly given by either party *the tenancy ceases*, and, unless a fresh tenancy be afterwards created, the landlord cannot distrain for *subsequent* rent, notwithstanding the tenant continues in possession for a year or more after the expiration of the notice. The remedy in such case is by action for use and occupation (c).

(a) Woodfall's Landlord and Tenant, Chapter VIII, Section 7.

(b) *Ibid.*

(c) *Ibid.*

Section 106 of the Transfer of Property Act (IV. 1882) runs thus—

“ 106. In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy ; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy.

Duration of certain cases
in absence of written contract or local usage.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence or (such tender or delivery is not practicable) affixed to a conspicuous part of the property.”

In the absence of any contract or local custom, as regards leases for immoveable property for *other* than agricultural manufacturing purposes, including leases of houses, the tenant is deemed to be from month to month, and fifteen days' notice required terminating with the end of the month (a).

A notice to quit is not rendered unnecessary by the death of the landlord, or of the tenant, nor by an assignment of the term or of the reversion. But in all such cases notice to quit should be given by or to the person or persons for the time being legally entitled to the term or to the reversion, as the case may be (b).

When notice to quit is duly given by the landlord, or other person for the time being legally entitled to the reversion, and he afterwards assigns his reversion, the assignee may avail himself of the notice (c).

(a) See KHUDA BAKSU v. SHEO DIN, I. L. R. 8 All. 40

(b) Woodfall's Landlord and Tenant, Ch. VIII, Section

(c) *Ibid.*

A proper notice to quit given to the tenant or his assignee will operate against any subsequent assignee (a).

Where the demise or agreement specifies the term or event upon which the tenancy is to determine, no notice to quit is necessary, as where the demise is for one year, or for any certain number of years, or till a particular day (b).

Where the plaintiff claims by title paramount to the tenancy from year to year, notice to quit is unnecessary (c).

A disclaimer by a tenant from year to year of the reversioner's title renders any notice to quit unnecessary (d).

A notice to quit may be given either by the landlord or by the tenant, or by the authorized agent of either party. The agent, who, if acting generally, may give the notice in his own name, but not if he is acting specially, ought to have sufficient authority when the notice is given, or, at least, when it begins to operate: a subsequent recognition is not sufficient. A notice by an agent of an agent is not generally sufficient (e).

Any person for the time being legally entitled to the immediate reversion of and in the demised premises, *e. g.*, as assignee, devisee, heir, executor or administrator of the landlord, may give notice to quit. One of several executors or administrators is competent to give a notice to quit on behalf of all. Any subsequent owner deriving title through or under the party giving the notice may avail himself of it (f).

A mortgagee whose mortgage is *subsequent* to the commencement of a tenancy from year to year created by the mortgagor is an assignee of the reversion, and he may give the tenant the usual notice to quit. But a *prior* mortgagee need not give any notice to quit (g).

A notice to quit signed by one of several joint tenants on behalf of himself and the others (whether authorized by them or not) is sufficient to determine a tenancy from year to year

(a) Woodfall's Landlord and Tenant, Chap. VIII, Sec. 7.

(b) *Ibid.* (c) *Ibid.* (d) *Ibid.* (e) *Ibid.*

(f) *Ibid.* (g) *Ibid.*

as to *all* ; because the tenant holds *the whole premises of all* so long as he and all shall please, and a notice to quit given by any one effectually puts an end to that tenancy. And therefore also a notice to quit given on behalf of several joint tenants by a person authorized by one of them to give such notice is sufficient to determine the tenancy as to all (a).

A notice to quit given by one of several tenants in common may be to quit his undivided part or share. Where they *demise jointly* they seem to stand on the same footing as joint tenants, and notice to quit may accordingly be given by either of them on behalf of himself and the others (b).

A notice to quit given by the landlord should be given to his immediate tenant, or to his assignee, &c., in whom the term is then vested, and not to a mere sub-tenant. A notice addressed to the tenant, but served upon the sub-tenant upon the premises, is sufficient (c).

A notice to quit given by the tenant should be given to his *immediate landlord* or his assigns. If the immediate landlord is dead, or has assigned his reversion, the notice should be given to the person or persons for the time being *legally entitled to the immediate reversion*, e. g., to the heir, executor, administrator, devisee or assignee of such landlord, as the case may be. A mere collector of rents has no actual authority to receive such notices (d).

A tenant holding over after the expiry of the term with the consent of the landlord cannot be evicted without a reasonable notice to quit, and except in the case of repudiation of the landlord's title, a tenant from year to year is entitled to six months' notice to quit (e).

(a) Woodfall's Landlord and Tenant, Chapter VIII, S. 7.

(b) *Ibid.* (c) *Ibid.* (d) *Ibid.*

(e) NANABHAI RUSTAMJI v. PESTANJI JAMSETJI, 6 B. H. C. R. A. C. J. 31 ; BABA v. VISHVANATH JOSHI, I. L. R. 8 Bom. 228 ; NARAYAN BHIVRAO v. KASHI, I. L. R. 6 Bom. 67 : RAM-CHANDRA v. DOWLATJI, Prin. Judg. for 1880, p. 10 ; YADNESHWAR v. RAMA, Prin. Judg. for 1881, p. 180 ; BALAJI v. BHIKAJI, Prin. Judg. for 1881, p. 181 ; AMARSANG v. BAI MAN, Prin. Judg. for 1880, p. 209 ; MAHADEO v. MANAJI, Prin. Judg. for 1873, p. 185.

A notice to quit is not rendered unnecessary by the death of the tenant. His representatives take his place and have the same right to notice, and, if the tenancy has not been legally put an end to, can sue for possession a tenant put in by the landlord (a).

[*Suit to eject—Want of notice—Failure of suit.*] The plaintiff sues to eject defendants alleging them to be trespassers but who are found to be tenants. *Held* that they are entitled to notice and the plaintiff not having given notice, his suit must fail.—RAGHUNATHRAO v. KRISHNARAO, Prin. Judg. for 1892, p. 405.

[*Notice to quit—To whom to be given.*] Plaintiff brought a suit for possession. Defendants 1 and 2 were in possession as mortgagees of defendants Nos. 6 to 7 tenants of the plaintiff and transferees of their interests but liable to be redeemed. *Held* that defendants Nos. 1 and 2 stand in the shoes of defendants Nos. 6 to 7, and notice to them would be good notice if they hold under an annual tenancy.—KHANSI CHHABJIMIA v. AJRAMAL, Prin. Judg. for 1895, p. 409.

[*Consequence of not giving notice—Dismissal of suit.*] The plaintiff sued to eject defendants alleging them to be trespassers, but they were found to be tenants. *Held*, that they were entitled to notice, and the plaintiff not having given it, his suit must fail.—RAGHUNATHRAO v. KRISHNARAO, Prin. Judg. for 1892, p. 405.

[*Denial of landlord's title—Notice to quit not necessary.*] A tenant who denies his landlord's title is liable to be treated as a trespasser and to be ejected without the customary notice to quit.—MAHADAJI v. SOMA, Prin. Judg. for 1874, p. 82. See also RAHIM v. KASAM, Prin. Judg. for 1875, p. 181; SANTO v. VENKAJI, Prin. Judg. for 1886, p. 314; and VISHNU v. MORSHET, Prin. Judg. for 1887, p. 4.

[*Plea of permanent tenancy—Notice to quit.*] Where a yearly tenant sets up, but fails to prove, permanent tenancy, a notice to quit is not necessary.—SHAHBA v. BALYA, Prin. Judg. for 1873, p. 66.

(a) TAVNARA v. KALAPA, Prin. Judg. for 1889, p. 79.

Sufficiency of Notice.

An insufficient notice to quit given by the tenant and assented to by the landlord will not determine the tenancy nor operate as a surrender on the expiration of such notice (a).

It is not necessary that the period allowed in a notice to quit by a landlord to his tenant should terminate at the end of the year, but the notice must be in respect of the date of determination of the tenancy as well as in other respects a reasonable notice. A notice to quit served on the 26th of Pous, and allowing two months to the tenant to vacate his holding, such period thus expiring on the 26th Falgun, when it appeared that cultivation began in the months of Magh and Falgun, and that they were the months for letting land out in the district, held not to be a reasonable notice (b).

What is a " reasonable " notice is a question of fact to be decided in each case, having regard to its particular circumstances, and the local customs as to reaping crops and letting land (c).

[*Annual tenancy—Notice to quit—Sufficiency of notice.*] On 28th September 1891, plaintiff gave defendants, who held his land as annual tenants, a notice in the following terms :—".....Therefore, within two days from the receipt of this notice meet us, increase the rent, and give us a legal writing, or in default, on 31st March 1892 we shall keep present two good men and take full possession of the said land with all trees &c." Held, that the notice was a good and valid notice to terminate the defendant's tenancy.—
KIKABHAI GANDABHAI v. KALU GHEDA, Prin. Judg. for 1896, p. 318.

[*Suit to eject without notice—Notice given in decree.*] Where the defendants on termination of their lease had remained in pos-

(a) Woodfall's Landlord and Tenant, Ch. VIII, Sec. 8.

(b) BIDHUMUKHI DEBRA CHOWDHRAIN v. KEFYUTULLAH, I. L. R. 12 Calc. 93 ; Cal. L. R. 82. See also RADHA GOVIND KOER v. RAKHAL DAS MUKHERJI, I. L. R. 12 Calc. 82.

(c) RADHA GOVIND KOER v. RAKHAL DAS MUKHERJI, I. L. R. 12 Cal. 82.

session paying the stipulated rent and the Court in a suit to eject them had held that they were entitled to reasonable notice and thereupon passed a decree for surrender of the land after six months; *Held* that the notice to which the defendants were entitled could not in this way be given in the judgment and that the suit must be dismissed.—*ABU v. VENKATRAMANA*, Prin. Judg. for 1893, p. 44.

One of the liabilities of a lessee is that on the determination of the lease he is bound to put the lessor into possession of the property (a).

(P) " WHO HAS BEEN A FORMER OWNER OR PART OWNER."

The former owners or part owners and their representatives are saved from liability to the ejection jurisdiction on determination of a tenancy or other right. This provision is made because it was found on enquiry that the former Act was largely used virtually for collecting debts from mortgagors and debtors who accepted the nominal position of tenants in regard to their own property and bound themselves to pay heavy rents, and that much hardship was caused in this way. As a further safeguard in the same direction, power is given to the Mamlatdar by the proviso to clause (1) of this section to refuse to exercise his powers in cases of determination of tenancies, and the like where he thinks that such exercise would be inequitable or unduly harsh, or that the case could be more suitably dealt with by a Civil Court (b).

(Q) " YEAR."

"Year" means a year reckoned according to the British calendar (c).

(R) " WRITING."

Expressions referring to "writing" are to be construed as including references to printing, lithography, photography

(a) The Transfer of Property Act, 1882, s. 108, cl. (q).

(b) See the Statement of Objects and Reasons, Bom. Govt. Gaz. dated 4th Sep. 1905, Part VII, page 521.

(c) Bombay Act I of 1904, s. 3, cl. (51).

and other modes of representing or reproducing words or figures in a visible form on any substance (a).

(S) "ATTEMPT HAS BEEN MADE SO TO DISTURB OR OBSTRUCT."

The mere forming of the intention or design to disturb or obstruct does not constitute an attempt. An attempt is the manifestation of intention by some external act done towards causing obstruction or disturbance. For example, assembling men with implements to divert a water-course or to commit trespass, collecting thorns to obstruct or disturb a passage, declaration of an intention to dispossess accompanied by an act, &c.

(T) "IN THE USE OF ROADS OR CUSTOMARY WAYS THERETO,"

A right of way is a mere right of passing over the land of another without any interruption. The right is *not* a right to the *land* nor to any corporeal interest in the land, and the soil is in no way the property of the owner of the right (b).

A right of way may, like any other easement, be permanent, or for a term of years or other limited period, or subject to periodical interruption, or exerciseable only at a certain place, or at certain times, or between certain hours, or for a particular purpose, or on condition that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified act (c).

A right of way may be created by (1) express grant, (2) prescription or (3) necessity (d).

The grant of an easement of necessity is implied when it is such that without it the thing granted could not be enjoyed.

(a) Bombay Act I of 1904, s. 3, cl. (50).

(b) MANGALDAS v. JEWANRAM, I. L. R. 23 Bom. 673.

(c) S. 6 of the Indian Easements Act (V of 1882).

(d) IMAMBUNDEE v. SHEO DYAL RAM, 14 W. R. C. R. 199 ; GOLUCK CHUNDER CHOWDHRY v. TARINEE CHURN CHUCKER-BUTTY, 4 W. R. C. R. 49 F. B.

ed ; as where one sells a field surrounded by his own land, a right of way to get at the field is an easement of necessity, and is implied to have been granted to the buyer, or reserved by the seller, as the case may be. The necessity is to be understood as it stood at the time of the conveyance and severance ; and a necessary easement, in this sense, does not mean only one essentially necessary, but one necessary for the convenient and comfortable enjoyment of the property. But an easement of necessity is commensurate only with the existence of such necessity, and ceases with it. A way of necessity, once created, must remain the same as long as it continues at all ; its direction cannot be varied (a).

Where a right of way has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years, the right to such way shall be absolute (b).

A customary way is an easement, but it may or may not be an easement of necessity. If a person can reach his field by a road and also by a customary way through the land of another, the way is not a way of necessity ; but if there be no other way except the footpath, then it is a way of necessity.

An easement of way must not be used for any purpose not connected with the enjoyment of the dominant heritage (c).

Illustration.

A, as owner of a farm Y, has a right of way over B's land to Y. Lying beyond Y, A has another farm Z, the beneficial enjoyment of which is not necessary for the beneficial enjoyment of Y. He must not use the easement for the purpose of passing to and from Z.

The dominant owner must exercise his right of way in the mode which is least onerous to the servient owner ; and

(a) Collett's Law of Torts, § 205. See ss. 13, 28 and 41 of the Indian Easements Act (V of 1882).

(b) Section 15 of the Indian Easements Act (V of 1882).

(c) *Ibid.* Section 21.

when the exercise of an easement can, without detriment to the dominant owner, be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined (a).

Illustration.

A has a right of way over B's field. A must enter the way at either end, and not any intermediate point.

In the absence of evidence as to the probable intention of the parties, a right of way of any one kind does not include a right of way of any other kind (b).

A Mamlatdar has no power to grant relief by way of injunction in respect of *all* roads or of *all* ways or of *all* customary ways, but only those roads or customary ways, which lead to the land or premises used for agriculture or grazing, or trees, or crops, or fisheries : or to the water from any well, tank, canal or watercourse, used for agricultural purposes.

[*Right of way at certain times.*] There may be a right of way limited to a particular season, and notwithstanding that the person claiming it could go by another way.—*SALOJI v. PANDUJI*, Prin. Judg. for 1875, p. 172.

[*Right of way for limited purposes.*] A right of way may be limited to a right to use the way for certain special purposes only.—*RAGHUPATI v. BAPUJI*, Prin. Judg. for 1874, p. 3.

[*Right of way—Servient owner offering another way.*] A servient owner cannot obstruct the right of way enjoyed by the dominant owner and offer another way instead.—*VARAJLAL v. MOTI*, Prin. Judg. for 1893, p. 473.

[*Right of way—Khadki, roadway of.*] The common right of the owners of houses over the road way of their *Khadki* is not a mere right of passage from one point to another but is a right of passing over the entire roadway of the *Khadki*.—*SHEVAK KASANDAS v. SHEVAK NATHABHAI*, Prin. Judg. for 1893, p. 540.

[*Right of passage.*] Where the only easement enjoyed by the plaintiff on defendant's land was one of passage over the de-

(a) *Ibid.* Section 22,

(b) *Ibid.* Section 28, cl. (a),

fendant's land, such an easement could be maintained by the defendants supplying a sufficient space for passages and he would be at liberty to build on the rest of the land.—*DALSUKH v. HARIBHAI*, Prin. Judg. for 1891, p. 244.

[*Way of necessity—Right of way—Land taken for public purposes.*] Where the taking of a part of a person's land for public purposes, e. g., for building a hospital, cuts off all access to the rest of his land, he will be entitled to a right of way over the land so taken, which can only be effected by giving him compensation for the remaining land.—*VITHAL v. THE COLLECTOR OF POONA*, Prin. Judg. for 1874, p. 118.

[*Sufferance—Right of way.*] A right of way by sufferance over another's land cannot create a permanent right.—*ASHOOTOSH CHUCKERBUTTEE v. TEETOO HOLDAR*, W. R. (1864) C. R. 293.

[*Right of way.*] To constitute a right of way, there must have been an uninterrupted user as of right, and not one exercised at the mere will and favour of the other party.—*FUTTER ALI v. ASGUR ALI*, 17 W. R. C. R. 11.

[*Permitting cattle to pass over ground between village and public road—Right of way.*] The owner of a piece of land between a village and the public road, who allows his neighbour's cows to pass over it on the way to pasture, does not thereby create a right of easement over the land so as to deprive it of all value by rendering its cultivation impossible.—*GOOROOCHURN GOON v. GUNGAGOBIND CHATTERJEE*, 8 W. R. C. R. 269.

[*User—Evidence of right of way.*] User during previous ownership is no evidence of a right of way which relates to the land of another.—*OBNOY CHURN DUTT v. NOBIN CHUNDER DUTT*, 10 W. R. C. R. 298.

[*Claim of right of way under contract.*] A party who claims, under a contract, the re-opening of a way, is not required by Act IX of 1871, s. 27, to prove user for twenty years.—*KALLARAM DHUR v. JOOGUL KISHORE SURMAH*, 23 W. R. C. R. 290.

[*Use limited to season of year.*] A right of way may be created by use continued for many successive years, even though the use is limited to one particular season of the year alone.—*OOMUR SHA v. RUMZAN ALI*, 10 W. R. C. R. 363.

[*Pathway over waste land—Discontinuance during rainy season.*] A right of user over a pathway may be established notwithstanding that the path passes over waste land. A temporary interruption, such as during the rainy season, cannot affect a right of user.—MAHOMED ANSUR v. SEFATOULLAH, 22 W. R. C. R. 340.

[*User—Easement—Existence of other access to road.*] Time and user create a right of easement over the property of others. A's right of way over B's homestead is not affected by the fact of there being another pathway by which access to the main road may be obtained by it.—SHAM BAGDEE v. FUKEER CHAND BAGDEE, 6 W. R. C. R. 222.

[*Right of user—Existence of other access to premises.*] A plaintiff's right of user of a pathway to certain premises cannot be affected by the existence of another path, by which he may obtain access to the same premises.—MOKOONDONATH BHADOORY v. SHIB CHUNDER BHADOORY, 22 W. R. C. R. 302.

[*Nature of right of way.*] A right of way is ordinarily a right of passing, and not a general right to pass from one point to other point.—GOLUCK CHUNDER CHOWDHRY v. TARINEE CHURN CHUCKERBUTTEE, 4 W. R. C. R. 49.

[*Mode of exercising right of way—Indirect way.*] If a person has a right of way from one place to another over a particular line, he cannot be compelled to use a different and substituted way. But where the right is simply to pass from one point to another, the party desiring to exercise the right cannot claim to pass in a particular tortuous and indirect course between the two points.—HAMID HOSSEIN v. GERVAIN, 15 W. R. C. R. 496.

[*Right to freedom from obstruction—Ownership of soil.*] A person who has a right of way cannot claim anything more than that the reasonable exercise of his right shall not be obstructed. It is only ownership of the land that carries with it the overship of every thing *usque ad cælum*.—TOOLSEEMONEY DEBEE v. JOGESH CHUNDER SHAHA, 1 Cal. L. R. 425.

[*Road used only by particular section of community—Private way.*] Where there is a road the privilege of using which is enjoyed only by one particular section of a community, the road is not a public one.—SHAM SOONDER BHUTTACHAREE v. MONEY RAM DASS, 25 W. R. C. R. 233.

[*Continuous user—Discontinuance.*] A right of way over the land of another must be kept up by constant use.—**HURIDAS NANDI v. JADUNATH DUTT**, 5 Beng. L. R., Ap., 66 ; S. C. 14 W. R. C. R. 79.

[*Substitution of new way for old one—Non-user—Abandonment of right.*] Where a new way is substituted for an old one with the consent of the person entitled, and the non-user of the original way is accompanied by acts which warrant the Court in inferring an intention to release, the right of resumption is lost : the non-user need not extend over any defined period.—**RAJ BEHAREE ROY v. TARA PERSHAD ROY**, 20 W. R. C. R. 188.

[*Loss of right of way—Relinquishment of right in land.*] The relinquishment of all rights and interests in land exchanged does not necessarily involve loss of right of way over the land.—**KALEE KISHORE ROY v. DEEN DYAL SEIN**, 4 W. R. C. R. 83.

[*Closing right of way—Substitution of another way.*] The owner of the land over which there is right of way by an ancient pathway cannot, without the consent of the parties entitled to the right, substitute another path and shut up the ancient pathway.—**TARINEE CHURN CHUCKERBUTTEE v. TARINEE CHURN CHUCKERBUTTY**, 1 Ind. Jur., N. S., 6.

[*Roads or customary ways to fields—Road to street—S. 4 of Bom. Act III of 1876—Jurisdiction.*] Plaintiff complained that defendant obstructed him in a certain right of way from his house to the street in the heart of the city. *Held*, that the subject-matter was the use of way to the street. That was not within the provisions of s. 4 of Bombay Act III of 1876 ; the use of roads or customary ways to fields being the only use of way referred to in that section.—**DHARAMCHAND DAYABHAI v. CHUNIBHAI DAYABHAI**, 2 Bom. L. R. 607.

[*Suit for restoration of the use of the road—Mamlatdar—Jurisdiction—Bombay Act III of 1876, ss. 4 and 15.*] The plaintiff had a right of way over a road to his property. On the 28th July 1900, the defendants erected a hedge across the road : but the plaintiff was allowed to pass through this hedge. On the 20th November 1900 the defendants put up another hedge beyond the first hedge and this prevented the plaintiff from using the road,

altogether. He instituted this suit, under the Mamlatdars' Courts Act, on the 3rd December 1900.

The Mamlatdar framed issues under s. 15 (c) of the Act.

The plaintiff contended that as he was in possession or enjoyment of the use of the road in dispute, the issues to be framed should be under s. 15 (b) of the Act. The Mamlatdar, in rejecting this contention, stated :

" But from the wording of that clause it is clear, that the issues under it are to be framed where the plaintiff avers that he is entitled to the restoration of the use by reason of the determination of any tenure or other right of the defendant in respect of the use: and this is not shown to be the case here."

The Mamlatdar then rejected the plaintiff's claim without going into evidence remarking :—

" The plaintiff's contention is that he is entitled to the restoration of the use of the road. But under s. 4 cl. (1) this Court has no power to restore the use of a road. It can only grant an injunction under cl. (2) of that section in respect of the use of a road. In this case the plaintiff is not entitled to claim relief by way of injunction, as he is not in possession of the use at the time of the suit : vide I. L. R. 13 Bom. 213."

The plaintiff thereupon applied to the High Court.

" CHANDAVARKAR, J.—The Mamlatdar is, we think, wrong in holding that the plaintiff's suit cannot lie because in his plaint he avers that on the date of the suit his right to use the road had ceased in consequence of the defendant's obstruction. We take that allegation to mean no more than that it was that obstruction which prevented his use of the road. But that does not imply an admission on his part that he was not in actual enjoyment of the use claimed. Section 15 must be read subject to s. 4 which is the section which gives jurisdiction to the Mamlatdar :—A person is in the enjoyment of a use within the first issue when but for the obstruction he complains of, he would be in use. That is the only reasonable interpretation of cl. (c) of s. 15, having regard to the fact that the enjoyment of the user mentioned in the first issue prescribed by it, does not refer to any enjoyment on the date of the suit. The case must be sent back to the Mamlatdar for disposal on the merits."—NANABHAI SADANAND v. DWARKADAS DHARAMSI, 3 Bom. L. R. 681.

[*Bombay Act III of 1876, ss. 4 and 15 (a)—Construction—Suit to remove obstruction to way—Jurisdiction—Issues—Error in*

the Act.] The plaintiff alleges that at Kanheri, in the Thana District, there are two pieces of land belonging to him: on a piece of land towards the north he has got his house, to the south of that there is a piece of land belonging to the first defendant, and to the south of that again is a field of the plaintiff: for many years he was in the habit of going to and fro through the piece of land belonging to the first defendant between the plaintiff's two pieces of land: the defendants have wrongfully closed his right of way, they have put a shed across the north end of this passage and put a cactus fence across the south end of it; and under these circumstances the defendants have closed the above-mentioned passage and stopped the enjoyment thereof; and he prays that the defendants be ordered to remove the said cactus and the said shed and make the plaintiff's passage clear or unobstructed as before.

The Mamlatdar raised the two statutory issues in s. 15 (a) of Bombay Act III of 1876, and rejected the plaint for the following reasons:—

"In view of s. 4 of the Act which lays down specifically the powers of the Mamlatdars' Court and specially to para 2 thereof it is only by injunction to the person causing or who has attempted to cause such disturbance or obstruction in the possession of the use of roads that the Mamlatdar can give relief, whereas no such thing is sought for by the plaintiff, who in view of the only issue to be tried under s. 15 (a) can claim relief only if he were unlawfully dispossessed of any property such as lands, premises, trees, crops or fisheries or of the profits thereof, or if he were deprived of the use only of such things as water from wells, tanks, canals or water-courses.

"The passage claimed in this instance is more a use than property and the use of which one could legally claim under s. 15 (a) being thus restricted, I do not think I can legally grant the relief prayed for in the plaint."

The plaintiff applied to the High Court under s. 623 of the Civil Procedure Code alleging that the Mamlatdar erred in holding that the suit was bad because the proper relief was not indicated.

RUSSELL, J.—* * * "There can be no doubt that it is a very noticeable omission from the first paragraph of s. 4 that the words "or the use of roads or customary ways to fields" do not follow the words "to restore the use of water from wells etc." However why they do not so follow is perhaps somewhat difficult to say.

"But it appears to me that s. 4 deals only with the remedies which can be given to a person who files a claim under the Mamlat-

dars' Act. If he is seeking immediate possession of land etc., or the profits thereof, or for the restoration of the use of water from wells etc., the Mamlatdar has power to grant the remedy of putting him in possession thereof or granting the restoration thereof. That is one remedy in respect of these specific things. The other remedy is by an injunction under the following paragraph of the same section. It is obvious in reading para 2 of s. 4, that the word "of" after "or" in "or of the use of roads or customary ways to fields" is obviously a misprint for the word "in," which is used in the preceding sentence, viz. "in the use of water from any well, tank, canal or water-course etc.," because otherwise if "of" was rightly used, the section would be intended to be worded "possession of any lands, premises, &c., or in the use of water from any well &c. or possession of the use of roads or customary ways to fields," which really is and would be unintelligible.

" Looking therefore at paragraph 2, the remedy there is that where the person is obstructed or disturbed in the use of roads or customary ways to fields, the Court may grant an injunction to the person causing, or who has attempted to cause such disturbance or obstruction. That is another remedy which the Mamlatdar can give.

" Now what do we find when we look at s. 15 ? S. 15 says, " On the day appointed the Mamlatdar shall proceed to hear all the evidence that is then and there before him, and to try the following issues, viz.—

* * * *

" Now the words there (i. e. in s. 15 (a)) used are "deprived of any use." It does not say "any use" such as is mentioned in the first paragraph of s. 4 of the Act, but "any use" which, I apprehend, must be taken to mean "any use of roads or customary ways as well as any use of water from any wells &c."

" Now what the plaintiff here alleges is that he has been obstructed in the use of this road to such an extent that he has been wholly deprived of the use thereof ; and it is impossible to suppose that the second clause of s. 4 of the Act was intended to refer only to cases of partial obstruction when a person was wholly prevented from using the road.

" Then the last paragraph of s. 15 is material.

* * * *

" He is given an entirely free hand with regard to the remedy

that he is to give. Therefore the remedy in this particular suit will not be only the restoration of the use of the ways but he may grant an injunction also, and this is clearly seen when one sees the form of injunction which is form C."

ASTON, J.—* * * "The Mamlatdar has failed to notice that if the plaintiff established these two issues [i. e. s. 15 (a) (1) and (2)] in the affirmative, the plaintiff would become entitled under the latter portion of s. 15 to such order as the circumstances of the case appear to require, provided that such order be not in excess of the powers vested in the Mamlatdar by s. 4. S. 15 must be read subject to s. 4: NANABHAI SADANAND v. DWARKADAS DHARAMSI, (3 Bom. L. R. 681).

"As the Mamlatdar has jurisdiction under s. 4 to grant an injunction in case of obstruction or disturbance to the use of roads or customary ways to fields and a deprivation of an use is a disturbance, the Mamlatdar is in error in supposing that the terms in which the statutory issues are framed for a case where the plaintiff does not aver deprivation of an use, deprive the Mamlatdar of the jurisdiction to try the issues (a), and give such relief as he has jurisdiction to give under the second paragraph of s. 4."—BHAU MANGESH WAGLE v. AHMEDBHOOY HABIBBHOOY, 8 Bom. L. R. 312.

[*Change of use—Increase of burden.*] Under s. 23 of the Indian Easements Act (V of 1882), a right of way enjoyed for agricultural purposes may be used for the purposes of a factory, provided no additional burden is thereby imposed on the servient heritage.—JESANG v. WHITTLE, I. L. R. 23 Bom. 595.

[*Landlord and tenant—Right of way.*] A tenant cannot as against his landlord acquire by prescription an easement of way in favour of the land occupied by him as tenant over other land belonging to his landlord. So held by the Full Bench, GAYFORD v. MOFFAT, I. L. R. 4 Ch. App., 133 referred to.—UDIT SINGH v. KASHI RAM, I. L. R. 14 All. 185.

[*Right of way—Severance of tenement by the owner—Implied grant.*] Implication of a grant of easement upon the severance of a tenement may extend to a "way," but that is so only where there has been some permanence in the adaptation of the tenement from which continuity could be inferred.—CHARU SURNOOKUR v. DOKOURI CHUNDER THAKOOR, I. L. R. 8 Calc. 956 distinguished

—RAM NARAIN SHAHA v. KAMALA KANTA SHAHA, I. L. R. 26
Calc. 311.

[*Right to go to collect fruit—Right to have the branches overhanging—Accessory right.*] The right to go on the plaintiff's land to pick the fruit off the branches was perfectly distinct from the prescriptive right to have the branches overhanging the land, and could not be said to be accessory to the latter right in the sense of being within the limits of that right.—PARSOTAM GHELA v. GANDRAP FATELAL GOKULDAS, I. L. R. 17 Bom. 745.

[*Landlord and tenant—Easement of necessity.*] A tenant cannot, as against his landlord, acquire by prescription an easement of way in favour of the land occupied by him as tenant over other land belonging to his landlord.—UDIT SING v. KASHI RAM, I. L. R. 14 All. 185 approved. GAYFORD v. MOFFAT, 31 L. J., Ch. 610 followed. *Quaere*—Whether one tenant can acquire a prescriptive right of easement against other tenant under the same landlord.—JEENAB ALI v. ALLABUDDIN, 1 Cal. W. N. 151.

[*Right of way—Purchase of adjoining land—Way of necessity—Sale-deed—Construction—Circumstances existing at the time of the sale.*] A person purchasing a plot adjoining his own land, and having access to the plot through his land, cannot acquire a way of necessity over his vendor's land of which the plot formed a part. The fact that if the plot had been sold to a third person, he would have acquired a way of necessity, does not affect the question.

Where the words used in a deed of sale were “ Sarva hakk wa sambandh ” (i. e. all rights and accompaniments), Held that the words in themselves, apart from the circumstances at the time of the sale, did not include a right of way over the vendor's property as conveyed along with the portion of the land sold ; but if there was an old path leading across the vendor's adjoining ground to the plot sold, and the purposes for which the plot was sold, and the conduct of the parties were such as to justify an inference that by the use of these words it was the intention of the parties to convey the right to use the path, it would be open to the Judge to find as a fact that such was the intention.—THE MUNICIPALITY OF THE CITY OF POONA v. VAMAN RAJARAM GHOLAP, I. L. R. 19 Bom. 797.

[*Right of passage for boats in the rainy season—Right of way.*] A right of passage for boats in the rainy season over a

channel wholly in another man's land, is, in respect of extent, analogous to an ordinary right of way ; and the dominant owner cannot complain of the servient owner's narrowing the channel, so long as the latter, by so doing, does not prevent the former from passing and repassing as conveniently as he has always been accustomed to do.

A right of passage for boats in the rainy season over another person's tank must be claimed in particular direction in order to be valid.—DOORGÀ CHURN DHUR v. KALLY COOMAR SEN, I. L. R. 7 Calc. 145.

(U) " ISSUE AN INJUNCTION TO THE PERSON CAUSING."

The following are the definitions of the term ' injunction' given by various authors :—

A writ of Injunction may be described to be a judicial process whereby a party was required to do a particular thing according to the exigency of the writ. The most common form of a writ of injunction was that which operated as a restraint upon the party in exercise of his real or supposed rights and was sometimes called the remedial writ of injunction (a).

An Injunction is an order remedial, the general purpose of which is to restrain the commission or continuance of some wrongful act of the party enjoined (b).

An Injunction is a judicial process, by which one who has invaded or is threatening to invade the rights, legal or equitable, of another, is restrained from continuing or commencing such wrongful act (c).

There are three features characteristic of an injunction. (1) It is a judicial process. (2) The object obtained thereby is a restraint or prevention. (3) The thing restrained or prevented is a wrongful act. This may have actually taken place, in which case its repetition is prevented ; or

(a) Story's (Grigsby) Equity Jurisprudence, 2nd Ed. § 861.

(b) Joyce on Injunctions, I.

(c) Burney, Encyclopædia of the Laws of England, VI., 464.

being merely threatened, the threat is restrained from being put into execution.

The usual relief afforded by the operation of law is *Remedial*. Sometimes, however, the law interferes for prevention, though its remedial interference is far more frequent. When the balance of justice is disturbed by wrong-doing or even by the threat of it, the law in some cases will not leave the injured party to the usual remedy by way of compensation, but will interfere to restore as far as possible the *status quo ante*, thereby preventing the continuance of an injury, or the realization of a threat of injury, instead of, in effect, allowing either on terms of compensation being made by the wrong-doer. When the law so acts, it acts by means of an injunction, which is thus the means of affording preventive relief (a).

That which is threatened must amount to an *injury*, i. e., something of a wrongful nature, something which, if completed would give a right of action (b).

As to the meaning of an injury being "*threatened*," there must be "*a strong case of probability* that the apprehended mischief will in fact arise." The occurrence of the injury need not be *inevitable*, i. e., that there is no possibility the other way, but "*there must be such a great probability*, that, in the view of ordinary men, using ordinary sense, the injury would follow." Mere vague apprehension that the injury feared will be inflicted is not enough; as where a trespass has entirely ceased at the time of the injunction being applied for, and there is merely a fear on the applicant's part that it may be recommenced (c).

Para 2 of this section says that a Mamladar has power to issue an injunction to the person *causing* disturbance or obstruction. Para 4 of this section says that the cause of action shall be deemed to have arisen on the date on which the disturbance or obstruction *first commenced*. And clause (c) of section 19 says that if the plaintiff avers (of course in his

(a) Nelson's Law of Injunctions, p. 2.

(b) *Ibid*, p. 172.

(c) *Ibid*, p. 173.

plaint) that he is *still* in possession of the property, or in the enjoyment of the use, but that the defendant *disturbs* or *obstructs*, then the issues to be tried are:—

- (1) Whether the plaintiff or any person in his behalf is actually in possession or enjoyment &c.?
- (2) Whether the defendant is *disturbing* or *obstructing* &c.?

From this it is evident that in order to entitle himself to the grant of an injunction to the defendant the plaintiff must prove not only that the disturbance or obstruction existed on the date of the plaint but that it is continued up to the time of the decision of the case.

From this it also follows that if after the filing of the suit for an injunction, but before the decision of the case, the defendant dispossesses the plaintiff or deprives him of his use of water, this will prevent the plaintiff from obtaining an injunction, for *cessante ratione cessat ipsa lex*, *i. e.*, the reason of the law ceasing, the law itself ceases. But the plaintiff will, under such circumstances, have to bring a fresh suit under the first para of this section for possession or restoration as the case may be.

An injunctive order is issued to the *person* causing disturbance or obstruction. Such an order being directed to *particular* persons, will not run with the land. Such an order, therefore, cannot be forced against a transferee (a).

[*Construction*—“*Profits of the same*”—*Intention of the Legislature*—*Physical possession*—*Injunction*.] When cl. 2, S. 4 of the Mamlatdars' Act is compared with cl. 1 of the same section, the inference that can be drawn from the omission from it of the words “*profits of the same*” (that is of lands), is that only an interruption of physical possession or enjoyment was intended to be removed by the injunction for which the clause provides.—DESAI MALABHAI BAPUBHAI v. KESHAVBHAI KUBERBHAI, I. L. R. 12 Bom. 419; S. C. Prin. Judg. for 1887, p. 233.

(a) See VITHAL GOVIND ROKADE v. SAKHARAM NEMCHAND, 1. Bom. L. R. 854.

[*Constructive possession—Right to sue—Agent—Injunction.*]

A landlord who has only a constructive possession of lands through his tenant, cannot obtain relief by way of injunction under clause 2 of section 4 of the Mamlatdars' Act (Bombay Act III of 1876). (DESAI MALABHAI BAPUBHAI v. KESHAVBHAI KUBERBHAI, I. L. R. 12 Bom. 419 followed).—D sued in the Mamlatdar's Court, as A's constituted attorney, for an injunction restraining defendants from causing any obstruction to his possession of certain lands. The land belonged to A's husband, who was alleged to be a lunatic. But there was no adjudication of his lunacy, nor was A appointed a manager of his estate under Act XXXV of 1858. *Held*, that D had no right to sue. A not having been appointed a manager of her husband's estate, had herself no right to sue in respect of a disturbance of her husband's possession. She could not, therefore, authorize her agent to sue on her behalf.—NEMAVA v. DEVANDRAPPA, I. L. R. 15 Bom. 177 ; S. C. Prin. Judg. for 1890, p. 133.

[*Suit for disturbance of possession—Physical possession—Possession by tenant—Jurisdiction.*] There must be physical possession to enable an aggrieved person to invoke the Mamlatdar's assistance in a case falling under the second clause of section 4 of the Mamlatdars' Act (Bombay Act III of 1876). A person who is in possession through his tenant cannot, therefore, sue for an injunction for disturbance of possession under the Act. (DESAI MALABHAI v. KESHAVBHAI, I. L. R. 12 Bom. 419 approved and followed).—ABA BIN SADOBIA v. PARVATRAO BIN GANPATRAO PATIL, I. L. R. 18 Bom. 46 ; S. C. Prin. Judg. for 1892, p. 417.

[*Possessory suit—Mortgagor—Possession—Relief under the Mamlatdars' Act.*] A Mortgagor who was never in possession of the land mortgaged by him after he passed the mortgage cannot claim relief under the Mamlatdars' Act. (ABA v. PARVATRAO, Prin. Judg. for 1892, p. 417 followed).—NARAYAN BIN TATYA GUJAR v. BHAU BIN CHIMNA GUJAR, Prin. Judg. for 1893, p. 159.

[*Plaintiff building wall on his land—Defendant obstructing, claiming right of way—Suit to remove obstruction—Jurisdiction.*] Plaintiff began to build a wall on his own land, when the defendant, claiming a right of way over the land, obstructing him. Plaintiff then sued in a Mamlatdar's Court for an injunction restraining the defendant from obstructing him. *Held*, following GANESH v. RAM-

CHANDRA (Prin. Judg. for 1891, p. 96), that the Mamlatdar's Court had jurisdiction in the case.—JOSHI PURSHOTAM v. JOSHI NATHABHAI, Prin. Judg. for 1896, p. 540.

[*Right of passing water over defendant's land—Obstruction to easement—Suit for injunction—Jurisdiction.*] The plaintiff complained to the Mamlatdar that the right he had of passing water from the roof of his house and his ground on to, and having it carried away over, the land of the defendant, had been obstructed by the act of the latter. The Mamlatdar granted the injunction asked for. Held, that the Mamlatdar had no jurisdiction in the case, as the words of S. 4 of the Act "possession of any lands, premises, crops, trees or fisheries, or in the use of water from any well, tank, canal or water-course, or of the use of roads or customary ways to fields" cannot be construed so as to include the use of the easement.—JAGA VALABH v. DAHYABHAI MONBHAI, Prin. Judg. for 1896, p. 340; FATMABIBI v. BHANDARI PEMA, Prin. Judg. for 1896, p. 592.

(V) "WITHIN SIX MONTHS."

In computing the period of six months the day on which the cause of action arose must be excluded (a).

If the Court is closed on the last day of the period of six months, the plaint may be presented on the next day afterwards on which the Court is open (b).

"Month" means a month reckoned according to the British calendar (c).

(W) "FROM THE DATE ON WHICH THE CAUSE OF ACTION AROSE."

The words "from" and "to," when used with reference to a series of days or other periods of time, respectively, exclude and include the first and the last of the days or other periods in such series (a).

(X) "THE CAUSE OF ACTION SHALL BE DEEMED TO HAVE ARISEN."

[*Delivery of possession in execution of a decree of a Civil Court—Subsequent lease to the judgment-debtor—Fresh cause of*

- (a) Bombay Act I of 1904, s. 10, cl. 1.
- (b) Bombay Act I of 1904, s. 11.
- (c) Bombay Act I of 1904, s. 3, cl. 30.

action.] Vinayak obtained possession of land from Balu in execution of a decree of a Civil Court. After obtaining possession, Vinayak leased the land to Balu. On Balu's refusal to vacate the land on the expiration of the lease, Vinayak brought a possessory suit in the Mamlatdar's Court. The Mamlatdar rejected the plaint, holding that he ought not to order restoration of possession of the land again and again. *Held*, that a fresh cause of action accrued to Vinayak on the refusal of Balu to give possession on the expiry of the lease, and that the Mamlatdar was wrong in declining to accept the plaint.—**VINAYAK VISHVANATH BHOPLE v. BALU BIN BHIKU, I.** L. R. 20 Bom. 491; S. C. Prin. Judg. for 1895, p. 174.

(Y) "FIRST COMMENCED."

Under s. 23 of the Indian Limitation Act (XV of 1877) in the case of a *continuing* wrong, limitation begins to run at every moment of the time during which the wrong continues. Thus, where the defendant obstructs or diverts a water-course or a drain, the cause of action is renewed *de die in diem*, so long as the obstruction or diversion is allowed to continue. But under the Mamlatdars' Courts Act the period of limitation, *viz.* six months, runs from the date on which the disturbance or obstruction *first* commenced.

Many easements are, by their nature, intermittent—that is usable or used only at times (a); e. g., a right of path for cattle to graze (b), a right of way limited to one particular season of the year (c), a right to the use of water, a right of pasture, a right of passage for boats over the defendant's land when it became covered with water during the rainy season (d) &c. Such easements, by their very nature, necessitate intervals, long or short, according to circumstances (e). In such case the question of *continued* enjoyment is a question of fact.

(a) S. 6 of the Indian Easements Act (V of 1882).

(b) **SHAIKH MAHOMED ANSUR v. SHAIKH SEFATOOLLAH**, 22 W. R. C. R. 340.

(c) **OMUR SHAH v. RUMZAN ALI**, 10 W. R. C. R. 363; **SALOJI v. PANDUJI**, Prin. Judg. for 1875, p. 172.

(d) **KOYLASH CHUNDER GHOSE v. SONATUN CHUNG, BAROOIE**, I. L. R. 7 Calc. 132.

(e) **Phear on Rights of Water**, 97.

It is an inference to be drawn from fact. So long as the plaintiff's right is not interfered with whenever he has occasion to use it, his enjoyment must be considered as continuing all the year round (a). A cessation of user occasioned by the accident of a dry season or other causes over which the claimant has no control, does not cause a breach in the continuity of the enjoyment (b). A cessation of user of an easement of grazing one's cattle on another's land, caused by the dominant owner not having any cattle for two or three years, does not amount to a discontinuance of the enjoyment of the right (c). Where the cessation of user is incapable of explanation consistently with the continued enjoyment of the right, it amounts to a discontinuance (d).

(Z) " EXPLANATION. "

The explanation to this section is inserted in view of a doubt which has arisen on the point (SHIVDEVRAO v. BHAGWANTRAO, P. J. for 1895 p. 502). It follows the law as interpreted in Keso v. Moro, *ib.*, 1883, p. 120; KRISHNA v. GOPALA, *ib.*, 1890, p. 316 and BHAU v. DADE, *ib.*, 1896, p. 196. The exercise by a joint owner towards his co-owners of any right which he has over the joint property, should not, it is thought, come within the purview of the Act (e).

6. The Collector (A) may, after due notice (B) to the parties, by order in writing transfer any suit from any Power of Collector to transfer suits. Mamlatdar's Court in his district to any other Mamlatdar's Court in his district, and the Mamlatdar's Court to which the suit is so transferred shall thereupon exercise jurisdiction in such

(a) JAHANVI v. BINDU BASHNI, I. L. R. 26 Calc. 593 at 597; S. C., 3 Cal. W. N. 610.

(b) HALL v. SWIFT, 4 Bing. N. C. 381.

(c) Goddard, 3rd Ed., 131.

(d) *Ibid.* 238.

(e) See the Statement of Objects and Reasons in the Bombay Government Gazette dated 4th September 1905, Part VII, page 520.

suit ; but any order issued to village-officers under section 21 shall be issued by the Mamlatdar to whom such village-officers are subordinate.

This section is new and invests Collectors with power to transfer cases.

(A) "COLLECTOR."

'Collector' means, in places other than the City of Bombay, the chief officer in charge of the revenue-administration of a district (a).

(B) "AFTER DUE NOTICE."

The maxim of law is *audi alteram partem*, *i. e.*, no man should be condemned unheard (b). If the Collector for some reason or other wish to transfer a case, the parties should have an opportunity of showing a cause why the case should not be transferred. Therefore before transferring any suit due notice must be given to the parties.

If a notice is issued by the Collector *suo motu*, no fee is leviable.

But if on the application made by one party a notice is to be issued to the other party, the fee chargeable for the notice will, on the analogy of a notice issued under s. 14, be 3 annas ; and this notice also will have to be served in the same manner.

7. All suits under this Act shall be commenced by a plaint (A), which shall be presented to the Mamlatdar in open Court (B) by the plaintiff (C), and which shall contain the following particulars :—

(a) the name, age, religion, caste (D), profession and place of abode of the plaintiff ;

(b) the name, age, religion, caste, profession and place of abode of the defendant (E) ;

(a) Bombay Act I of 1904, s. 3, cl. 11.

(b) Broom's Legal Maxims, 7th Ed., p. 89.

(c) the nature and situation of the property of which possession or use is sought, or the nature of the injunction to be granted, as the case may be;

(d) the date on which the cause of action (F) arose;

(e) the circumstances out of which the cause of action arose; and

(f) a list of the plaintiff's documents, if any, and of his witnesses, if any, shewing what evidence is required from each witness, and whether such witnesses are to be summoned to attend, or whether the plaintiff will produce them on the day and at the place to be fixed under section 14.

(A) "PLAINT."

A 'plaint' is the statement in writing of a cause of action (a).

[*Plaint—Court-fee.*] The amount of fees to be paid on plaints presented in the Mamlatdars' Courts was fixed by the Bombay Act V of 1864 and Act XVI of 1838 as 8 annas, and to the Court Fees Act passed by the Government of India a schedule is attached in which there is an express provision directing that the fees to be paid in these Courts should be regulated according to Act XVI of 1838 and the Bombay Act V of 1864. The repeal of these Acts by the Bombay Act III of 1876 wipes them off the Statute Book, and renders the reference to them in the Court Fees Act inoperative; and as it cannot be said that this Act is to be read as the Act referred to by the Court Fees Act (No. VII of 1870), no special fee is fixed for suits instituted in the Mamlatdars' Courts, and instead of the original nominal fee of 8 annas, the fee ordinarily charged on plaints in Civil Courts would have been payable. This difficulty has been got over by the Notification of the Government of India dated the 20th June 1877.—See Compilation of General Rules in force in the Revenue Department, Part X, page 344, para (25). Further by Act XII of 1891, Sch. II, Art 4

of the Court Fees Act is amended and for the words "Bombay Act V of 1864" the words "the Mamlatdars' Courts Act, 1876" are substituted; and the fee prescribed for a plaint is 8 annas. Now see the Bombay General Clauses Act (I of 1904), s. 9.

No conciliator's certificate is necessary to institute a suit in a Mamlatdar's Court (a).

[*Probate of will—Plaintiff.*] A person claiming title under a will is not bound to obtain probate of the will before suing in a Mamlatdar's Court. The decision in **BHAGWANSANG v. BECHARDAS**, I. L. R. 6 Bom. 73, held to apply to Mamlatdars' Courts.—**BAI ITCHA LAKSHMI v. GHELABHAI DULABHRAM**, Prin. Judg. for 1889, p. 215.

[*Plan of the property in dispute.*] In a possessory suit filed under Bombay Act III of 1876, the Mamlatdar has no power to order the plaintiff to append a plan to the plaint, showing the situation of the property, in dispute. If the plaint is defective in its statement of the necessary particulars as to the nature and situation of the property the amendment contemplated by the Act is an amendment in writing on the face of the plaint.—**CHENBASAYA v. RUDRAPA**, I. L. R. 14 Bom. 581; S. C. Prin. Judg. for 1890, p. 48.

[*Third parties let into possession by person obtaining possession of land otherwise than by due course of law—Frame of plaint.*] A person obtaining possession of land otherwise than by due course of law cannot alter or improve his position by letting third parties into possession as his tenants. Such tenants stand in the shoes of their lessor and jointly with him are liable to be ousted by proceedings taken in the Mamlatdar's Court. The setting out of the circumstances under which such tenants obtained possession is not an irrelevant allegation which the Mamlatdar can order to be struck out under section 8. If the law were otherwise, the Mamlatdars' Act would be little better than a dead letter.—**ANTU BIN KUSBA KURNE v. VISHNU GOVIND BAWA**, I. L. R. 22 Bom. 630; S. C. Prin. Judg. for 1897, p. 21.

(a) Section 47 of the Deccan Agriculturists' Relief Act (XVII of 1879).

(B) "OPEN COURT."

If a plaint is presented to a Mamlatdar in his chambers or in a place which is not his *open* Court, the presentation is *illegal*.

(C) "PLAINTIFF."

A 'plaintiff' is the person who commences an action against another who is called defendant (a).

Now we shall consider who the plaintiff is for the purposes of this Act. In construing an Act the intention of the Legislature is to be gathered from a consideration of the whole statute ; for no one can rightly understand a part until he has again and again gone through the whole (b).

From *ante* s. 5 and also from cl. (a), (b) and (c) of *post* s. 19 it will be seen that for the purposes of this Act a plaintiff is the person who avers that—

- (1) He has been unlawfully dispossessed of any property or deprived of any use. Or,
- (2) He is entitled to possession of any property or restoration of any use by reason of the determination of any tenure or other right of the defendant. Or,
- (3) He is disturbed or obstructed, or to disturb or obstruct him an attempt has been made.

In the *first* case if the person, who is dispossessed of any property or deprived of any use, die without bringing a suit under this Act, his legal representative cannot bring it after that person's death. For the legal representative cannot aver that *he* was dispossessed of any property or deprived of any use as mentioned in cl. (a) of s. 19.

In the *second* case if the person entitled to possession of any property or restoration of any use by reason of the determination of any tenure or other right of the defendant, die without bringing a suit under this Act, his legal representative can—

(a) Wharton's Law Lexicon, 10th Ed.

(b) See *Don v. BRANDLING*, 7 Barn. and Cr. 643. See Maxwell's Interpretation of Statutes, 4th Ed., p. 67.

not aver that he was entitled to possession *on the determination of the tenure* as mentioned in cl. (b) of s. 19; for when the tenure was determined, the *deceased person* became entitled to possession, and the legal representative became entitled to possession *after the death of the deceased not by reason of the determination of the tenure*.

But if the tenure or other right is, according to the terms of the lease &c. determined, not in the lifetime of the lessor &c., but after his death, then the legal representative of the lessor &c., *who becomes entitled to possession by reason of the determination of the tenure or other right*, can bring a suit under this Act.

In the *third* case if the person who was disturbed or obstructed, or to disturb or obstruct whom an attempt was made, die without bringing a suit under this Act, his legal representative cannot aver that the defendant disturbs or obstructs *him*, or has attempted to disturb or obstruct *him* in his possession or use as mentioned in cl. (c) of s. 19. Consequently the legal representative cannot bring a suit under this Act.

But if in any of these three cases the plaintiff die *while* the suit is pending, then the name of his legal representative can be entered on the record under sub-s. (3) of s. 18.

(D) "CASTE."

A Christian, a Parsi or a Mahomedan has no caste. In such a case, only the religion of the party may be mentioned.

(E) "DEFENDANT."

For the purposes of this Act a 'defendant' is the person—

- (1) Who has unlawfully dispossessed the plaintiff (See s. 5 and cl. (a) of s. 19.)
- (2) Whose tenure or other right is determined. (See s. 5 and cl. (b) of s. 19.)
- (3) Who disturbs or obstructs, or attempts to disturb or obstruct, the plaintiff. (See s. 5 and cl. (c) of s. 19.)

If the defendant die before a suit is brought under this Act, no suit can be brought against the legal representative under this Act.

Again in the second case if the tenure or other right is according to the terms of the lease &c., determined, not in the lifetime of the lessee &c., but after *his* death, then the *legal representative* of the lessee &c. may be sued under this Act.

If the defendant die while the suit is pending, the name of his legal representative can be entered on the record under sub s. (3) of s. 18.

(F) "CAUSE OF ACTION."

'Cause of action' means that bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the case (a).

8. Where a petition not in the form of a plaint

(A) is presented to the Mamlatdar and the subject matter thereof appears to fall within the scope of section 5, the Mamlatdar shall 'explain' to the person presenting the petition the nature of the reliefs afforded by this Act and shall inquire whether the petitioner desires to obtain relief thereby. If the petitioner expresses a desire so to obtain relief, the Mamlatdar shall endorse the desire on the petition which shall thereupon be deemed to be a plaint (B) presented under section 7.

This section is new.

**(A) "A PETITION NOT IN THE FORM
OF A PLAINT."**

A petition presented to a Mamlatdar may be formal *i. e.*, according to the form given in *ante* s. 7 or informal. If informal, the Mamlatdar will act under this section. But if it is

(a) *MUSA YAKUB MODY v. MANILAL AJITRAI, I. L. R. 29 Bom. 368; S. C. 7 Bom. L. R. 20.*

formal, he will at once take steps under *post* s. 14. If a plaint is formal but it does not contain all the particulars required by s. 7, or if it contain particulars not required by s. 7, the Mamlatdar must act as required by *post* s. 9.

**(B) "SHALL THEREUPON BE DEEMED
TO BE A PLAINT."**

The petition is not a plaint before the desire of the plaintiff is endorsed on it. But when the endorsement is made, the petition together with the endorsement constitutes a plaint, and then it will have to be subscribed and verified as required by *post* s. 10.

See the notes to *post* s. 9.

9. Where the plaint does not contain the particulars specified in section 7 Examination of plaintiff on oath. or is unnecessarily prolix, the Mamlatdar shall forthwith examine the plaintiff upon oath (A), and ascertain from him such of the particulars specified in section 7 as are not clearly and correctly stated in the plaint and shall reduce the examination to writing (B) in the form of an endorsement (C) on or annexure (D) to the plaint which shall thereupon be deemed to be part of the plaint (E). Where the plaintiff requires time to obtain any of the particulars specified in section 7, the Mamlatdar shall grant him such time (F) as may under all the circumstances appear reasonable.

This section is new.

The village agriculturist, particularly in Sind, frequently presents his grievance in the form of a petition, not of a plaint under the Act. The petitioner is, therefore, sent to the village-officers for report in the ordinary way and for one reason or another it may happen that the period of limitation elapses before the petitioner has realised the proper procedure to follow.

Sections 8 and 9 are, therefore, inserted to safeguard the interests of the informal petitioner and ignorant plaintiff (a).

(A) "OATH."

'Oath' includes affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing (b). By Act X of 1873, s. 6, it is provided that whether the witness is a Hindu or Mahomedan, or has an objection to taking an oath, he shall, instead of making an oath, make an affirmation. In every other case he shall make an oath.

(B) "WRITING."

'Writing' includes printing, lithography, photography and other modes of representing or reproducing words or figures in a visible form on any substance (c).

(C) "ENDORSEMENT."

'Endorsement' is any thing written or printed upon the back of a writing (d).

(D) "ANNEXURE."

The examination of the plaintiff may be reduced to writing on a separate piece of paper and annexed to the plaint.

(E) "SHALL THEREUPON BE DEEMED TO BE PART OF THE PLAINT."

The endorsement or the annexure together with the plaint constitutes a plaint, and then the procedure given in the following section is to be followed.

(F) "SHALL GRANT HIM SUCH TIME."

The time is not limited as in section 14. Supposing that a plaintiff has to get information from England or America, he will require a very long time for obtaining the particulars, and the Mamlatdar will be bound to grant him reasonable

(a) See the Report of the Select Committee published in the Bombay Government Gazette, Part VII, dated 26th February, 1906, p. 6.

(b) Bombay Act I of 1904, s. 3, cl. 32.

(c) *Ibid.* s. 3, cl. 50.

(d) Wharton's Law Lexicon.

time. Such a case will, however, be an exceptionable one. Ordinarily the particulars required by clauses (a), (b), (c), (d), (e) and (f) are so simple that a plaintiff ought to be able to give them at once.

10. When the plaintiff is presented, and has, if necessary, been treated in the manner specified in section 9, the Mamlatdar shall require the plaintiff (A) to subscribe and verify the plaint (B) in his presence, in open Court (C), in the manner following, or to the like effect:—

“I, A. B., the plaintiff, do declare that what is stated in this plaint is true to the best of my information and belief.”

(A) “PLAINTIFF.”

The word ‘plaintiff’ includes his pleader or recognized agent (see *ante* s. 3 cl. b). But it does not include a co-plaintiff.

(B) “SUBSCRIBE AND VERIFY THE PLAINT.”

The plaint must be subscribed and verified by the *same* individual, who may be the plaintiff, his pleader or recognized agent. A co-plaintiff not being included in the word plaintiff, has no authority as such to subscribe and verify the plaint for the plaintiff. The plaint must be subscribed and verified not at home but in the *presence* of the Mamlatdar in the *open* Court.

[*Minor plaintiff—Guardian—Pleader—Signing and verifying plaint.*] The pleader duly appointed by the guardian of a minor plaintiff can subscribe and verify the plaint.—**SAYAD SAIFULLA v. SAYAD HAJIMIA**, 1 Bom. L. R. 664.

(C) “OPEN COURT.”

A mamlatdar has to go from place to place in his Taluka for revenue matters. He is, therefore, required by post s. 14 to fix a place for trial. Therefore the place so fixed and where he transacts his official business must be deemed to be his Court; and that will be an *open* Court if the public have access to it.

If a plaint is not subscribed and verified *in the presence* of the Mamlatdar and *in open Court*, the procedure will be illegal, and it will affect the prosecution of the plaintiff under *post s. 25.*

11. (1) The Mamlatdar shall endorse the plaint to the effect that it was duly subscribed and verified.

(2) Where the plaintiff cannot write, the verification may be written for him in open Court (A) and he shall affix his mark (B) to his name in token of the authenticity of the verification, and the Mamlatdar shall, in such case, record that the verification was made in his presence at the request of the plaintiff, and that his mark was so affixed.

(A) "OPEN COURT."

See the notes under *ante s. 10.*

(B) "SHALL AFFIX HIS MARK."

What is the use of the plaintiff's making a mark which he cannot identify? If the verification is made by him in the presence of the Mamlatdar and endorsement is made by the Mamlatdar to that effect, that ought to be deemed sufficient even for charging an illiterate peasant with making a false verification under *post s. 25.*

12. The Mamlatdar shall reject the plaint.

(a) where the plaintiff declines to make a statement on oath under section 9; or

(b) where the plaintiff is willing to make or has made a statement on oath under section 9, but fails to furnish the particulars specified in section 7 within the time fixed under section 9 or altogether; or



(c) where it appears upon the face of the plaint,

(i) that the property or use claimed is not one of the kinds specified in section 5, or

(ii) that the cause of action arose more than six months (A) before the plaint was presented; or

(d) where the plaintiff declines to subscribe or verify (B) the plaint as required by sections 10 and 11.

(A) "MORE THAN SIX MONTHS."

[Cause of action—Limitation—Rejection of plaint.] A Mamlatdar cannot summarily reject a plaint on the ground that the cause of action arose more than six months before the plaint was presented, unless it so appear on the face of the plaint or after questioning the plaintiff.—*NEEMA KOM LAKHAPA V. DHAKYA BIN PARSAPA*, Prin. Judg. for 1891, p. 101.

(B) "OR VERIFY."

To carry out the intention of the Legislature, it is occasionally found necessary to read the conjunctions "or" and "and" one for the other (a). Section 10 *ante* says that "the Mamlatdar shall require the plaintiff to subscribe and verify the plaint." Section 25 *post* says that "Any plaintiff subscribing and verifying any plaint." Hence it appears that the intention of the Legislature is that the plaint should be subscribed and verified by the same individual (either plaintiff or his pleader or recognised agent).

13. Where it appears to the Mamlatdar that the subject of the plaint (A) is not within his jurisdiction (B), he shall return the plaint to be presented in the proper Court.

(a) Maxwell's Interpretation of Statutes, 4th Ed., 1857.

(A) "SUBJECT OF THE PLAINT."

The subject of the plaint, *i. e.*, the land, &c., must be within the taluka which forms the territorial jurisdiction of the Mamlatdar; but it is not necessary either for the plaintiff or for the defendant to be resident within the Mamlatdar's local jurisdiction, for both are allowed by s. 3 cl. (6) to employ recognised agents on their behalf.

[*Want of jurisdiction—Return of plaint.*] Under S. 10 of the Mamlatdars' Courts Act, 1876, a Mamlatdar can return a plaint *only* if it appear that he has no jurisdiction.

[*Return of plaint by Mamlatdar—Order of High Court to re-present plaint.*] Where a Mamlatdar declined to exercise a jurisdiction vested in him by returning the plaint, the High Court ordered that on the plaintiff re-presenting the plaint, within one month from the date of the order, the Mamlatdar should be guided by the provisions of Sections 6 to 9 of the Act.—*BAPU BIN MAHADAJI v. GANESH MANOHAR*, Prin. Judg. for 1888, p. 194.

(B) "JURISDICTION."

'*Jurisdiction*,' *i. e.*, territorial jurisdiction. No pecuniary limit is assigned to the Mamlatdar's jurisdiction. The subject-matter of the suit may be of *any* value. A second class subordinate Judge has no jurisdiction to try a suit in which the value of the claim is above Rs. 5,000 (a). A District Judge has no jurisdiction to try an appeal in which the value of the property in suit is above Rs. 5,000 (b).

14. (1) Where a plaint is admissible, the Mamlatdar shall receive and file it. He shall then fix a convenient day and place (A) for the trial of the case, and shall issue, at the expense of the plaintiff, notice in the form of schedule A (B) to the defendant. He shall then require the plaintiff to appear with his documents, if any, and witnesses, if any, on the day and at the place fixed.

(a) The Bombay Civil Courts Act (XIV of 1869), s. 24.

(b) *Ibid.* s. 26.

(2) The date to be fixed for the trial of the case shall not be earlier than ten days, nor later than fifteen days, from the day (C) on which the notice is issued, except for sufficient reason (D) to be recorded in writing by the Mamlatdar with his own hand.

(3) The place to be fixed for the trial of the case may be in the Mamlatdar's office, or at or near the scene of dispute (E), or at any other spot that the Mamlatdar considers convenient to the parties.

(A) "DAY AND PLACE."

The Mamlatdar is not only to fix a day for hearing the case, but also to appoint a *place* where the case is to be heard; for the Mamlatdar has to move from place to place within his taluka for fiscal and other purposes. But if he has to appoint a place other than his office, he must do so with due attention to the scene of dispute or the convenience of the parties. See clause 3.

(B) "NOTICE IN THE FORM OF SCHEDULE A."

As to the form of notice to the defendant see the Schedule A at the end of this Act.

The fee chargeable for every notice is 3 annas. (See the General Rules of the (Rev. Dep.) by Leg. Rem., p. 177.)

The Mamlatdar is a revenue officer and is presumed to be well conversant with the revenue procedure. The notice, therefore, issued under this section is to be served on the defendant either by tendering or delivering a copy thereof to him or his agent if he has any, or by affixing a copy thereof to some conspicuous place on the land if any to which such notice refers. (See s. 191 of the Bombay Land Revenue Code, 1879).

(C) "FROM THE DAY."

The period of ten or fifteen days is to be counted from the day on which the notice is *issued*. The first day is to be excluded (a).

(a) See Bombay Act I of 1904, s. 10, cl. (1).

(D) "EXCEPT FOR SUFFICIENT REASON."

There are cases, especially with regard to irrigated lands in Sind, where a speedy remedy is required and the minimum of ten days' notice would entail hardship. In such cases it is improbable that the consent of both parties could be obtained to an earlier date for trial, as such a course would presumably be contrary to the interest of the defendant. The sub-section (2) will enable the Mamlatdar to hear the case within a shorter period for sufficient reason (a).

Unless there be any "sufficient reason," a Mamlatdar has no discretion to appoint a day earlier than 10 days or later than fifteen days. The reason must, however, be recorded in writing by the Mamlatdar.

(E) "AT OR NEAR THE SCENE OF DISPUTE."

In intricate cases the witnesses may not be able to describe the situation of the places very accurately, in which cases it becomes desirable and is found convenient to make the witnesses point them out on the spot.

15. (1) Where either party requires any witness (A) to be summoned to appear on the day and at the place fixed, the Mamlatdar shall issue a summons (B) for that purpose.

(2) The Mamlatdar may issue, after recording his reasons in writing, a warrant (C) for the arrest of any such witness if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.

(3) The payment of the cost incurred in thus procuring the attendance of witnesses shall be re-

(a) See the Report of the Select Committee published in the Bom. Government Gazette, Part VII, dated 26th February 1906, p. 6.

gulated in accordance with the rules that may from time to time be in force (D) in regard to the attendance of witnesses in Subordinate Civil Courts (E).

(A) "WITNESS."

The singular includes the plural (a).

(B) "SHALL ISSUE SUMMONS."

For the procedure to be followed for procuring the attendance of witnesses see ss. 189, 190 and 192 of the Bombay Land Revenue Code, 1879. Every summons shall be in writing in duplicate, and shall state the purpose for which it is issued, and shall be signed by the officer issuing it, and if he have a seal, shall also bear his seal; and shall be served by tendering or delivering a copy of it to the person summoned, or, if he cannot be found, by affixing a copy of it to some conspicuous part of his usual residence. If his usual residence be in another district, the summons may be sent by post to the Collector of that district, who shall cause it to be served in the manner above described (s. 190).

[*Summons to a witness—Disobedience of summons—Contempt of authority.*] The accused was charged with the offence of not obeying a legal order to attend before the Mamlatdar of Vagra in accordance with a summons issued by the Mamlatdar under s. 189 of the Bombay Land Revenue Code (Act V of 1879). The Mamlatdar acting in his capacity as a Magistrate of the 2nd class tried and convicted the accused under s. 174 of the Indian Penal Code and sentenced him to a fine of Rs. 20.

The District Magistrate thought that the summons having been issued by the Magistrate in his capacity as Mamlatdar, he was disqualified, under s. 487 of the Code of Criminal Procedure, from trying the accused for contempt of his own authority, and also that the prosecution was bad for want of the sanction or complaint required by s. 195 of the Code of Criminal Procedure. Consequently the District Magistrate referred the case to the High Court under s. 438 of the Code of Criminal Procedure recommending that the conviction and sentence should be quashed and a retrial ordered.

(a) Bombay Act I of 1904, s. 13, cl. (b).

The reference was heard by a Full Bench.

PER CURIAM :—Following the decision of the Calcutta High Court in the case of the QUEEN-EMPERESS v. SARAT CHANDRA RAKHIT, I. L. R. 16 Calc. 766, we think that in determining the construction of s. 487 of the Criminal Procedure Code, effect must be given to the words "as such Judge or Magistrate," and that as those words must be read in connection with all the three classes of offences previously referred to, they preclude us from holding that a Magistrate is debarred by law from trying an accused person under s. 174 of the Indian Penal Code for disobedience of a summons issued by him in his capacity of Mamlatdar. This is, in our opinion, the correct construction of the section, although we are aware that it leads to a distinction between offences committed before him in his capacity as a Civil Judge and those committed before him as a Magistrate, for which there seems to be no sufficient reason.—QUEEN-EMPERESS v. RAIJI DAJI, I. L. R. 18 Bom. 380.

(C) "WARRANT."

A Mamlatdar may have, before the day fixed, reasonable grounds for believing that a witness has absconded or will not obey the summons, still he has no power to issue a warrant.

A Mamlatdar can issue a warrant to a witness only if (1) the summons has been duly served on him, (2) he fails to appear, and (3) no reasonable excuse is offered for the failure. This power was not given by the former Act.

(D) "THE RULES THAT MAY FROM TIME TO TIME BE IN FORCE."

The rules that are now in force in regard to the attendance of witnesses in Subordinate Civil Courts are as follow :—

" 21. In Courts subordinate to the High Court, the travelling and other expenses of witnesses shall be paid according to the following scale under sections 160 and 162 of the Code of Civil Procedure :—

(a) European and East Indian witnesses are to be allowed their actual expenses for carriage when the same are not in excess of six annas a mile. They are also to be allowed a sum not exceeding Rs. 2-8-0 a day for subsistence allowance

for the time of their attendance at and journey to and from the Court, if they demand the same.

(b) Native witnesses of the better class, as patels, panderpeshas, merchants, vakils, and persons of corresponding rank, are to be allowed from 8 annas to 1 Rupee a day, and artizans and persons of similar rank 6 annas a day, as subsistence allowance.

(c) Native witnesses of the class of cultivators and menials, who would not under ordinary circumstances voluntarily incur any expense on account of special lodging when away from home, are to be allowed subsistence money at the rate of 4 annas per day.

(d) The persons mentioned in clauses (b) and (c) are also to receive railway and other travelling expenses actually incurred by them, provided the same be reasonable. When the journey to and from the Court is made by railway or other means of conveyance, the time for which subsistence allowance is paid should be that actually spent on the journey. Where the journey is made on foot, 15 miles a day should be reckoned as a day's journey and subsistence allowance should be paid accordingly.

(e) Peculiar cases not provided for in the above rules, are to be dealt with according to their own merits, and at the discretion of the Court from which subsistence money or travelling allowance is demanded.

(f) Witnesses produced under warrants of arrest should receive subsistence money at the rate allowed to judgment-debtors.

"22. The period within which the travelling expenses and expenses for one day's attendance, under the foregoing rules are to be paid into Court by the party applying for a summons shall be fixed by the Court at the time when the application is made; and on the payment of the said expenses the summons shall be granted forthwith.

"23. Subsistence money due to witnesses during their attendance at the Court shall be paid to them daily (a)."

(a) Bombay H. C. Cir. Or., 1903, p. 11 *et seq.*

"105. The following are the scales of monthly allowances at daily rates prescribed by Government for the subsistence of judgment-debtors under s. 338 of the Civil Procedure Code :—

Europeans	from Re. 1 to Rs. 1-8.
Eurasians and Portuguese	...	„	As. 8 to Re 1.
Others	...	„	As. 3 to As. 12.

In fixing the rate of subsistence allowance, the ruling prices of grain should always be considered. (Vide G. R. J. D., Nos. 6298, dated the 12th October 1877, and 520, dated the 26th January 1881) (a).

(E) " IN SUBORDINATE CIVIL COURTS."

There are two sets of rules made by the High Court in regard to the attendance of witnesses. One set of rules is applicable to the High Court and the other to the mofussil. It is, therefore, necessary to state which rules are meant.

Under the last part of s. 12 of the former Act the High Court was authorized to make rules regarding the payment of the cost incurred in procuring the attendance of witnesses ; and consequently the High Court had made the rules published on page 68 of the Bombay High Court Circular Orders to the effect that the fee chargeable for each summons to a witness is 3 annas, and to every additional witness residing in the same village, if the processes be applied for at the same time, is two annas. But under the present Act the High Court is not so authorized, and consequently the above rules do not apply.

Now under clause 3 of this section the rules that are in force in regard to the attendance of witnesses in Subordinate Civil Courts must be applied. These rules are as follow :—

For each summons (a) to a single witness 4 annas, and (b) to every additional witness residing in the same village, if the processes be applied for at the same time, 2 annas. For every warrant of arrest in respect of every person to be arrested 8 annas (b).

(a) Bom. H. C Cir. Or., 1903, p. 58.

(b) *Ibid.* p. 68.

The serving officers are to be remunerated out of the fees received for the service of processes.—G. R. No. 4702, dated 18th August 1873.

16. (1) Where the plaintiff fails to attend, or

Where plaintiff makes default, plaint to be rejected with costs.

to produce his documents, if any (A), or to adopt measures to procure the attendance of his witnesses, if any, on the day

and at the place fixed, the Mamlatdar shall reject the plaint with costs (B), whether the defendant appears or not (C), unless the defendant admits the claim (D).

(2) Where the plaintiff attends as required by sec-

Where defendant does not appear, case to be heard *ex parte*.

tion 14, sub-section (1), but the defendant fails to attend, and the Mamlatdar is satisfied from the evidence before him that the

notice has been duly served on the defendant (E), and in sufficient time to enable the defendant to appear and answer on the day fixed in the notice, he shall proceed to hear and decide the plaint *ex parte*:

provided, *firstly*, that, if either party satisfies the

But case may be re-heard on sufficient cause being shown;

Mamlatdar (F) at any time within thirty days from the date of the rejection of a plaint under sub-section (1), or of an *ex parte*

decision under sub-section (2) (G), that he was prevented by some unavoidable circumstance (H) from attending, or from producing his documents, or from adopting measures to procure the attendance of his witnesses, as the case may be, it shall be lawful for the Mamlatdar to issue a notice in the form of Schedule B (I) at the expense of the applicant to the opposite party, and, if still satisfied after hearing the opposite party that the applicant was prevented as

alleged, to re-hear the case (J) at such time and place as he may then fix :

provided, *secondly*, that nothing in the foregoing or plaintiff may withdraw his suit, provisions shall prevent the plaintiff from withdrawing his suit (K) on payment of the defendant's costs (L).

This section shows the consequence of the non-attendance of any of the parties.

**(A) "OR TO PRODUCE HIS DOCUMENTS,
IF ANY."**

'Document' includes any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, which is intended to be used, or which may be used, for the purpose of recording that matter (a).

'His documents' of course means the documents mentioned in the plaint under s. 7, cl. (f). Suppose a plaintiff mentions several documents in his plaint, but on the day fixed for hearing he considers either that none of those documents is necessary or that only some of them are necessary, and consequently he produces no documents or only those which he considers material to his case, should the Mamlatdar reject the plaint simply because he fails to produce the documents mentioned in the plaint ?

**(B) "SHALL REJECT THE PLAINT
WITH COSTS."**

'With costs' means with all the costs on the plaintiff.

**(C) "WHETHER THE DEFENDANT APPEARS
OR NOT."**

These words are new, and remove the doubt whether a Mamlatdar can reject the plaint when *both* the plaintiff and the defendant do not appear.

(a) Bombay Act I of 1904, s. 3, cl. (16).

[*Non-appearance of plaintiff and defendant—Order rejecting the plaint*] In a possessory suit instituted in a Mamlatdar's Court neither the plaintiff nor the defendant appeared at the hearing. The case was, therefore, disposed of by the Mamlatdar under the first part of s. 13 of the Mamlatdars' Courts Act (Bombay Act III of 1876). *Held*, that the order of the Mamlatdar was an order rejecting the plaint.

A regular suit for possession having been brought in a Civil Court more than three years after the above order of the Mamlatdar ; *Held*, that the suit was time-barred under Article 47, Schedule II of the Limitation Act (XV of 1877).—PURUSHOTTAM DAYARAM v. CHATARGIR GURU ARJUNGIR, I. L. R. 25 Bom. 82 ; S. C. 2 Bom. L. R. 680.

(D) " UNLESS THE DEFENDANT ADMITS THE CLAIM."

This provision is new. If the defendant admit the claim, then under s. 19, sub. s. 4, the costs will follow the decision, *i.e.*, will fall on the defendant.

(E) " THAT THE NOTICE HAS BEEN DULY SERVED ON THE DEFENDANT."

As the proceedings under this Act are necessarily summary, it is very desirable to guard against the possibility of any inequitable decision being come to in consequence of notices not being properly served. The Mamlatdars are, therefore, compelled to satisfy themselves that notices have reached the defendants.

The sub-s. 2 authorises the Mamlatdar to proceed *ex parte* with the case, if from the evidence before him he is satisfied that the notice has been duly served on the defendant. *Expressio unius est exclusio alterius*. If not so satisfied he cannot so proceed. He is then *in statu quo ante*, and as the notice has not been issued (for *de non apparentibus et non existentibus endem est ratio*), Section 14 again becomes applicable and still remains to be satisfied by due issue thereof as a preliminary to further proceedings. This section leaves it to the Mamlatdar to decide in each case whether he is satisfied that notice has been duly served on the defendant. The Mamlatdar must in

each case exercise his own discretion. He could not be held to have exercised the wise and sound discretion which the Legislature expects when conferring discretionary powers, if he held 'substituted service' or such as that provided by s. 82 of the Civil Procedure Code, or service by fixing the notice on the defendant's door as provided for summonses in s. 80 of the Civil Procedure Code, was due service on the defendant.—See G. R. No. 1707, dated 7th March, 1893.

[*Ex parte decree—Service of notice.*] In a certain case, the Mamlatdar made a decree under the Act *ex parte* against the applicant and his co-defendants, and remarked in his judgment that the defendants had been served with a notice "in a proper manner." But when, nearly a year after the decree was made, the applicant's crops were attached in execution of the order for costs passed against the defendants and the applicant thereupon asked the Mamlatdar for a copy of any evidence on the record as to the service of the notice on him, the Mamlatdar replied that on a search of the records it appeared that there was evidence that the notice was sent to be served but that there was nothing on the record of the case to show that the notice was served. The notice to the defendants does not appear on the record of the case. As there was no evidence on the record from which the Mamlatdar could have been satisfied as to the service of the notice, and the applicant put in an affidavit to the effect that it was not as a matter of fact served, the High Court held that the Mamlatdar was not justified in hearing the case *ex parte* under s. 13 of the Act, and reversed the decree and remanded the case for a re-hearing.—FAKI ABDUL GAFUR VALAD FAKI AMIRUDIN v. FAKI KAMRUDIN VALAD FAKI MOHIDIN KHATIBA, Prin. Judg. for 1890, p. 251.

[*Mistake of date in summons—Dismissal of suit for non-attendance of parties—Reference by Collector—Practice of High Court, departure from in hard case.*] The Collector of Ahmednagar referred a case to the High Court stating the following facts, viz :—

Chimi mard Kusha Koli of Ratanwadi applied to the Mamlatdar for redress under the Mamlatdars' Courts Act on March 5th, 1897. The Mamlatdar fixed the 20th March for the hearing and wrote the date himself. This was read as the 27th by his office

who prepared the summonses accordingly. The Mamlatdar corrected one set, but not the duplicates which were sent out uncorrected by the office for service. On the 20th no one was present and the Mamlatdar accordingly dismissed the plaint. Chimi and her witnesses were present on the 27th as summoned, when she was told that her plaint had already been dismissed. It will be hard on her to tell her to petition for revision herself, because she could not afford the expense such a course would entail. She has been in no wise to blame.

The High Court considering the case to be of much hardship and the error referred to to be that of the Mamlatdar, departed from its usual practice of not passing any order at the instance of the Collector under the Mamlatdars' Act, when the parties do not apply for it, and on a reference by the Collector reversed the Mamlatdar's order and directed him to hear the case after giving proper notice to the parties.—CHIMI MARD KUSHA v. BHIMAYA VALAD RAMJI, Prin. Judg. for 1898, p. 40.

A summons is not duly served, if the defendant proves that he has not been served with summons at all.—ANUND MOYEE DOSSEE v. ANUND SOONDER MOZOOMDAR, 13 W. R. 237; or not in sufficient time to appear.—SHAIK AWLAD v. SHAIKH ABDOOL KUREEM, 18 W. R., 141; or has been improperly served.—CHANBASAPPA v. MAINABA, 7 B. H. C. R. A. C., 138; and where it was shown that there was only one summons, and that the serving officer had merely posted it on the door of one of the defendants, without attempting to serve him personally, it was held that all the defendants were entitled to have the suit restored.—SHIBOO ROY v. KASHEE ROY, 25 W. R. 394; otherwise as regards the one defendant if he had been properly served—EWING v. GHOSAIDAS GHOSE, 3 B. L. R. 7.

(F) " IF EITHER PARTY SATISFIES THE MAMLATDAR."

If a party, whose plaint is rejected or against whom an *ex parte* decision is passed, has good reason for asking a retrial, he should make an *application* on a stamp (see Court Fees Act VII of 1870, Sch. II. Art. 1), for the third para of this section

says that a notice is to be issued at the "applicant's" expense to the opposite party.

(G) "EX PARTE DECISION UNDER SUB-
SECTION (2)."

[*Refusal to adjourn for appearance of pleader—Application for rehearing.*] A Mamlatdar refused to allow a mukhtyar to appear for a defendant in a possessory suit or to adjourn in order that a pleader might appear, and made a decree against the defendant. This defendant applied to the Mamlatdar for a rehearing under s. 13 of Bombay Act III of 1876. But the application was refused on the ground that the plaint had not been heard *ex parte*. The High Court held that the Mamlatdar was wrong in holding that the decision was not *ex parte*, and reversed his order directing him to hear the application.—JANKIBAI KOM SAKHARAM TUKDEV v. GANESHBHAT BIN DADABHAT JOSHI, Prin. Judg. for 1890, p. 326.

(H) "UNAVOIDABLE CIRCUMSTANCE."

In the marginal note the expression "sufficient cause" is used, while in the body of the section the words used are "unavoidable circumstance." The marginal notes are not to be taken as parts of the statute (a). These two expressions are not synonymous. Every unavoidable circumstance is a sufficient cause, but every sufficient cause is not an unavoidable circumstance.

The applicant must show some circumstance which prevented him from attending &c., and which he could not avoid. For instance, some illness which entirely confines him to bed, sudden flood in a stream, some railway or other accident, insanity, &c.

The onus of proving "unavoidable circumstance" lies on the applicant.—See SHAIK TORAB ALI v. CHOORAMUN SINGH, 24 W. R. 262. But if he makes out a *prima facie* case the other party must rebut it.—See MUSSAMUT JHUTOO KOOER v. LULITA KOOER, 22 W. R. 423.

(a) Maxwell's Interpretation of Statutes, 3rd Ed., p. 62; SUTTON v. SUTTON, L. R. 22 Ch. D. 511; DUKHI MOLLAH v. HALWAH, I. L. R. 23 Calc. 55; PUNARDEO NARAIN SINGH v. RAM SARUP Roy, I. L. R. 25 Calc. 858; S. C. 2 Cal. W. N. 577.

The unavoidable circumstance may be proved either by the oath of the applicant or by an affidavit (a).

[*Plaintiff leaving the Court before the case is called on for hearing—Rejection of plaint—“Unavoidable circumstance.”*] The plaintiff failed to attend in the Mamlatdar's Court at the time when his case was called on for hearing on the 31st August, 1887. His plaint was, therefore, rejected with costs under s. 13 of this Act. On the 5th September, he explained that he was present in Court on the 31st August before his case was called on, but left the Court because defendant No. 6 was not present, and went home. He added that, afterwards, he broke his leg and could not attend the Court again before the 5th September. Thereupon the Mamlatdar issued summonses to the defendants, returnable on the 4th November, 1887, and proceeded to hear the suit on the merits. The High Court held that the Mamlatdar acted illegally and without jurisdiction in placing the suit again on the file; for under s. 13 of the Act he would have been justified in adopting this course only if the plaintiff was “prevented by some unavoidable circumstance” from being present when his case was called. The plaintiff was not so prevented as he admits that he was present in Court on the 31st August, before his case was called on, and left the Court-house of his own accord. The High Court, therefore, annulled the Mamlatdar's proceedings subsequent to his order of the 31st August, rejecting the plaint.—GOHED MERU KARSAN v. VALI VASTA ABHAL. Prin. Judg. for 1888, p. 219.

(I) “A NOTICE IN THE FORM OF SCHEDULE B.”

As to the Schedule B see at the end of the Act.

(J) “TO REHEAR THE CASE.”

[*Dismissal of suit under s. 13 of Bombay Act III of 1876—Application for rehearing—New suit on the same cause of action.*] A plaintiff who fails to attend with his proofs on the day appointed for the hearing of his suit, (whether the defendant then attends or not), and whose plaint is rejected under s. 13 of the Mamlatdars' Courts Act, 1876, has a right to apply to the Mamlat-

(a) DAMODHUR DASS v. CHOONEE BEBEE, 2 Hyde, 226; HARDATRAI SHRIKISANDAS v. VICTORIA FINANCE ASSOCIATION, 3 B. H. C. R. 60; ANUND MOYEE DOSSEEE v. ANUND SOONDUR MOZOONDAR, 13 W. R. 237.

dar for a rehearing of the case under the proviso to that section, but cannot bring a new suit on the same cause of action.—**GULABEHAI SHANKARJI V. KASANJI DAYABHAI**, Prin. Judg. for 1897, p. 246.

(K) "WITHDRAWING HIS SUIT."

This proviso is new.

The permission of the Mamlatdar is not required for the withdrawal of the suit, nor is it necessary to assign any reason for withdrawal.

If a plaintiff withdraw his suit, there will be no order rejecting the plaint and he will not in any way be bound by that order. Consequently the plaintiff will not be bound to bring a suit in a Civil Court within the shorter period of limitation *i.e.*, three years prescribed in Art. 47, Sch. II of the Indian Limitation Act (XV of 1877); but may bring it within twelve years under Art. 142.

If a plaintiff withdraw his suit, there seems no objection to his bringing another action on the same cause of action before a Mamlatdar, provided the suit is brought within six months from the date of the cause of action.

As the singular includes the plural, it is evident that if there are several plaintiffs, they *all* must join to withdraw the suit.

(L) "ON PAYMENT OF THE DEFENDANT'S COSTS."

A mere order of the Mamlatdar for the payment of the defendant's costs is not sufficient. His costs must be *actually* paid to him before the withdrawal of the suit by the plaintiff.

See also the notes to *ante* s. 5.

17. (1) Where, in the case mentioned in

sub-section (2) of section 16, the When proceedings Mamlatdar is not satisfied from may be adjourned. the evidence before him that the notice has been duly served on the defendant, and in sufficient time to enable the defendant to appear and answer (A) on the day fixed in the notice, he shall ad-

journ the trial of the case and issue a fresh notice under section 14, sub-section (1), to the defendant.

(2) Where any witness who has been duly summoned, or for whose arrest a warrant has been issued under sub-section (2) of section 15, fails to attend on the day and at the place fixed, the Mamlatdar may, if he considers there is sufficient reason, after taking the evidence of those present, adjourn the hearing of the suit from time to time till the attendance of such witness can be enforced.

(3) The Mamlatdar may, for any other sufficient reason to be recorded in writing, adjourn the trial of the case for such time as he thinks fit, but not ordinarily exceeding ten days.

(4) The provisions of sections 15 and 16 shall apply in respect of any day to which the trial of the case may be adjourned under this section, as if such day were the day originally fixed for the trial.

A Mamlatdar may adjourn a suit for any of the three following reasons, viz :—

- (1) Non-appearance of *defendant*;
- (2) Non-appearance of *witness*; or
- (3) Any other *sufficient* reason.

In the first case he must be satisfied that (1) notice was *not duly served*, and (2) not in *sufficient* time.

In the second case if there is *sufficient reason* to procure the attendance of a witness ; *e. g.*, inability of a material witness to appear on the day fixed, &c.

In the third case if there is any *other* sufficient reason to adjourn ; *e. g.*, no sufficient time to finish the work on the same day, &c.

(A) "IN SUFFICIENT TIME TO ENABLE THE DEFENDANT TO APPEAR AND ANSWER."

[Defendant entitled to proper notice—Postponement of case.]

Where a summons to the defendant was served on the 23rd December 1887, and on the 24th December which was the day appointed for the disposal of the case, the Mamlatdar refused to grant an adjournment applied for by the defendant to enable him to adduce his evidence, on the ground that it would be contrary to law; it was held that under section 11 of Bombay Act III of 1876, the defendant was entitled to proper notice, and that when the Mamlatdar found that, in consequence of the late service of the summons, the defendant could not produce his witnesses on the 24th December, he should have fixed another day for the trial.—*MUSA SULEMAN v. SALEMAN VALI*, Prin. Judg. for 1888, p. 185.

18. (1) A minor may sue or be sued (A),

if he is represented by a natural
Minor may be a party. or duly appointed guardian (B).

(2) The Mamlatdar may, at any stage of the

Power to add parties. proceedings, order that the name of any person to whom possession or enjoyment of the property or use claimed, or of any part thereof, may have been transferred (C), or the addition of whom as a party appears necessary in order to enable the Court effectually and completely to adjudicate upon the issues, be added as a plaintiff or defendant (D), as the circumstances of the case may require;

provided that no person shall be added as a plaintiff without his consent (E);

provided also that in respect of any person so added, not being a transferee pending the suit (F), the suit shall for the purposes of section 5, sub-section (3), be deemed to have been instituted on the day when his name was so added (G).

Procedure in case of death of party. (3) In case of the death of any party (H) while the suit is pending,

(i) if application is made (I) within one month of such death, the Mamlatdar shall determine summarily (J) who is the legal representative of the deceased party and shall enter on the record the name of such representative ;

(ii) if no such application is made, the suit shall abate (K).

(4) Where the Mamlatdar orders (L) the name of any person to be added as a defendant or enters on the record the name of any person as the legal representative of a deceased defendant, the Mamlatdar shall issue to such person a notice as provided in section 14 ; and the trial shall proceed on the date fixed in such notice.

This section is new.

(A) " A MINOR MAY SUE OR BE SUED."

'Minor' means a person who, under the provisions of the Indian Majority Act, 1875, is to be deemed not to have attained his majority (a).

Section 3 of the Indian Majority Act (IX of 1875) as modified by s. 52 of the Guardians and Wards Act (VIII of 1890) runs as follows :— "Subject as aforesaid every minor, of whose person or property, or both, a guardian other than a guardian for a suit within the meaning of Chapter XXXI of the Code of Civil Procedure, has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of eighteen years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age, shall be deem-

(a) Cl. (1), s. 4 of Act VIII of 1890.

ed to have attained his majority when he shall have completed his age of twenty-one years, and not before.

"Subject as aforesaid, every other person, whether a native or a foreigner, domiciled in British India, shall be deemed to have attained his majority when he shall have completed his age of eighteen years, and not before."

A guardian *ad litem* (a) is not a guardian within the meaning of this rule. A testamentary guardian, though he takes out probate from the Court, is not appointed by the Court (b). The guardian must be actually appointed under the Guardians and Wards Act (c), or the Court of Wards must actually assume the management of the minor's estate before he completes his eighteen years.

There was no provision in the former Act to enable a minor to sue or be sued in a Mamlatdar's Court. However, it was decided by the Bombay High Court that a minor can sue by his guardian (d) and he may also be sued provided he is represented by a proper guardian (e).

[*An infant can sue by his next friend.*] The Mamlatdars' Act, it is true, makes no provision for infants suing in the Mamlatdar's Court. But there is no reason why they should not. An infant is as much entitled to have his possession protected as an adult. The Code of Civil Procedure of 1859 made no provision for infants' suing, and yet suits were often brought by infants suing by their next friend when that Code was in force. It is an axium of English law that an infant can sue by his next friend, and it is proper that a Mamlatdar's jurisdiction should not be restricted by holding that an infant cannot sue in his Court in the usual way in which infants

(a) Section 443 of the Civil Procedure Code, 1882.

(b) JOGESH CHUNDER v. UMATARA, 2 C. L. R. 577.

(c) Act XX of 1864, Act XL of 1858 or Act VIII of 1890.

(d) DATTATRAYA KESHAV v. VAMAN GOVIND, I. L. R. 21 Bom. 88; S. C. Prin. Judg. for 1895, p. 349.

(e) SAYAD SAIFULLA v. SAYAD HAJIMIA, 1 Bom. L. R. 664; SHIDAPA BIN BASAPA v. NARSINHACHARYA, Prin. Judg. for 1896, p. 727.

sue. Simpson on Infants, page 469, shows that miscellaneous applications made by an infant are always made through their next friend.—**DATTATRAYA KESHAY v. WAMAN GOVIND**, I. L. R. 21 Bom. 88; S. C. Prin. Judg. for 1895, p. 349.

[*Possessory suit against minor—Guardian ad litem—Decree against minor.*] Where a minor was sued in a Mamlatdar's Court as represented by an adult as his guardian, but the latter refused to be appointed guardian *ad litem*, and therefore the Mamlatdar proceeded to hear the suit *ex parte* and awarded the claim, Held, that a minor can in a proper case be sued in a Mamlatdar's Court, but no decree can be passed against him unless he is properly represented by a guardian.—**SHIDAPA BIN BASAPA v. NARSINHACHARYA BIN BHIMACHARYA**, Prin. Judg. for 1896, p. 727.

[*Minor—Suit by guardian.*] Under the Mamlatdars' Courts Act, 1876, a minor can bring a suit by his guardian; he may also be sued under the Act, provided he is represented by a properly appointed guardian.—**SAYAD SANULLA v. SAYAD HAJIMFA**, I. L. R. 24. Bom. 230; S. C. I Bom. L. R. 664.

(B) "NATURAL OR DULY APPOINTED GUARDIAN."

'Guardian' means a person having the care of the person of a minor or of his property, or both his person and property (a).

A minor is incompetent to act as guardian of any minor except his own wife or child, or, where he is the managing member of an undivided Hindu family, the wife or child of another member of the family (b).

Guardians are either—

- (1) Natural;
- (2) Testamentary; or
- (3) Appointed by a Civil Court or by a Court of Wards.

The natural guardians of a Hindu minor are the follow-

(a) Cl. (2), s. 4 of Act VIII of 1890.

(b) S. 21 of Act VIII of 1890.

ing relations in order—one in default of the other:—father, mother, elder brother, nearest paternal kinsmen, and maternal kinsmen (a).

A Hindu father can transmit guardianship by will (b) but the mother cannot. He may even appoint a person other than the mother to be guardian of his minor children (c).

Under Mahomedan law guardians are either natural or testamentary (d).

Guardians are either near or remote. Of the former description are father and paternal grand-father and their executors and the executors of such executors. Of the latter description are the more distant paternal kindred, their guardianship extending only to matters connected with the education and marriage of their wards (e).

By s. 47 of the Indian Succession Act (X of 1865), which applies to wills made by persons other than Hindus, Mahomedans and Buddhists, a father, whatever his age may be, may by will, appoint a guardian or guardians for his children during minority.

The appointment of guardians of European British subjects is made under s. 5 of the Guardians and Wards Act (VIII of 1890).

(C) "MAY HAVE BEEN TRANSFERRED."

A Mamlatdar will have to inquire whether the alleged transfer is true or false. This again will lengthen the procedure, and the object of the Act is likely to fail.

(a) Mayne's Hindu Law, 6th Ed., § 221 et seq.; Ghose's Principles of Hindu Law, 2nd Ed., p. 851 et seq.

(b) SOOBAH PIRTHEE LAL JHA v. SOOBAH DOORGAH LAL JHA,

7 W. R. C. R. 73.

(c) VENKAYYA GARU v. VENKATA NARASIMHULU, I. L. R. 21 Mad. 401.

(d) MacNaughten's Mahomedan Law, § 62.

(e) *Ibid.*

(D) "BE ADDED AS A PLAINTIFF OR DEFENDANT."

This proviso is added on the analogy of the similar provision in s. 32 of the Code of Civil Procedure (a).

The power to add parties is intended to prevent disturbers of possession from evading recovery by a transfer of possession to third parties on the eve of suit or *pendente lite* (b).

There is, however, no provision for striking off the name, of persons unnecessarily made parties.

(E) "AS A PLAINTIFF WITHOUT HIS CONSENT."

A prudent man will not give his consent to be added as plaintiff; for he would not like to be bound by the summary order of the Mamlatdar. If he is bound by the Mamlatdar's order respecting the possession of any property, and if he has to bring a suit for the possession of the immoveable property comprised in that order, then he must bring the suit within three years from the date of the final order (c). Otherwise he can bring a suit for possession within twelve years from the date of the dispossession (d).

It is evident that a person can be added as a defendant without his consent.

(F) "NOT BEING A TRANSFeree PENDING THE SUIT."

Suppose an action was laid against A on January 1st and while it is still going on A transfers to B. B is then added as a party, but B says that the period of limitation has expired. Then as B is "*a transferee pending the suit*," the suit, under

(a) See Statement of objects and reasons, note on cl. 17, sub-cl. (1), in the Bombay Government Gazette, dated 4th September 1905, Part VII, page 521.

(b) See the Report of the Select Committee, published in the Bombay Government Gazette, Part VII, dated 26th February, 1906, page 6.

(c) See Art. 47, Sch. II, Act XV of 1877.

(d) See Art. 142, Sch. II, Act XV of 1877.

this proviso, will *not* be deemed to have been instituted on the day when his name was added and will not therefore be barred by the limitation of six months mentioned in s. 5, sub-s. 3.

(G) "WHEN HIS NAME WAS SO ADDED."

If a person is added as a plaintiff or defendant after the expiration of six months from the date when the cause of action arose, the suit will be barred by limitation in respect of such person. It is, therefore, advisable not to add any such person as a party.

(H) "IN CASE OF THE DEATH OF ANY PARTY."

In view of the fact that the death of a party would altogether preclude a new suit being brought under this Act in cases where the period of limitation has expired, provision is made for a summary procedure enabling representatives to be brought upon the record (a).

(I) "IF APPLICATION IS MADE."

If the plaintiff is dead, his legal representative may apply to have his name entered on the record, or if the defendant is dead, the plaintiff may apply to have the name of the legal representative of the deceased defendant so entered, in order to obtain the benefit of the suit. Similarly, if the plaintiff be dead, the defendant may apply to have the name of the plaintiff's legal representative brought on record or if the defendant be dead, his legal representative may apply to have his name entered in the place of the deceased defendant, with a view to obtain a decision in his favour. Again in the same way if both the plaintiff and the defendant die, the legal representative of each may do the same thing with the same object.

(J) "DETERMINE SUMMARILY."

The question who is the legal representative of any person is often times a very complicated and difficult question to decide, and unless a thorough inquiry is made, it is not

(a) See the Report of the Select Committee, published in the Bombay Government Gazette, Part VII, dated 26th February, 1906, p. 6.

possible to come to proper conclusion. Suppose, for instance, that a person comes forward as an executor of the will of the deceased, then it will be necessary to determine the genuineness and validity of the will, and the Mamlatdar will have to examine a host of witnesses on either side, and the inquiry may often times involve wilful perjuries and forgeries which are very common in India, and which are matters of daily experience to a Judge and professional man, a procedure which frustrates the object of the Act. Besides this, in order to ascertain the legal representative of a deceased person, a Mamlatdar must be well acquainted with the law of the party, that is, Hindu, Mahomedan and other laws. Consequently it is not easy to understand what is meant by "*shall determine summarily*."

If the law had required the legal representative to produce a probate, or letters of administration, or a certificate of heirship, to prove his representative character, instead of the inquiry by the Mamlatdar, the procedure would have been very simple and speedy.

(K), "THE SUIT SHALL ABATE."

If the suit abates, *i. e.*, fails for want of legal representative, then there is no provision made for the costs of the parties. As there is no decision in such a case, the ordinary rule that costs follow the decision cannot apply.

(L), "WHERE THE MAMLATDAR ORDERS."

The Mamlatdar has power to bring in the legal representative of a party either on application to him or *proprio motu*.

19. On the day fixed (A), or on any day to

which the proceedings may have been adjourned, the Mamlatdar shall, subject to the provisions of section 16 (B), proceed to hear all the evidence that is then and there before him (C), and to try the following issues (D), namely:—

(a) If the plaintiff avers that he has been unlawfully dispossessed of any property or deprived of any use (E) :—

(1) whether the plaintiff or any person on his behalf or through whom he claims was in possession or enjoyment of the property (F) or use claimed up to any time within six months before the suit was filed ;

(2) whether the defendant is in possession at the time of the suit, and if so whether he obtained possession otherwise than by due course of law ;

(b) if the plaintiff avers that he is entitled to possession of any property or restoration of any use by reason of the determination of any tenure or other right of the defendant in respect thereof :—

(1) whether the defendant is in possession of the property or in the enjoyment of the use by a right derived from the plaintiff (G) or from any person through whom he claims ;

(2) whether such right has determined at any time within six months before the suit was filed ;

(3) whether the defendant is other than a person who has been a former owner or part-owner within a period of twelve years before the institution of the suit of the property or use claimed, and other than the legal representative of such former owner or part-owner ;

(c) if the plaintiff avers that he is still in possession of the property, or in enjoyment of the use, but that the defendant disturbs or obstructs, or has attempted to disturb or obstruct, him in his possession or use :—

(1) whether the plaintiff or any person in his behalf (H) is actually in possession or enjoyment of the property or use claimed ;

(2) whether the defendant is disturbing or obstructing, or has attempted to disturb or obstruct (I), him in such possession or enjoyment ;

(3) whether such disturbance or obstruction, or such attempted disturbance or obstruction, first commenced within six months before the suit was filed.

(2) The Mamlatdar may, after due notice to, and in the presence of, the parties, summon and examine (J) as a witness any person who has not been summoned or produced, and may call for and cause to be proved any document which has not been applied for or produced, by either of the parties, where he considers it expedient in the interests of justice so to do, and may, if he thinks fit, make a personal inspection of the property in dispute in the presence of, or after due notice to, the parties.

(3) The Mamlatdar shall with his own hand make or sign a memorandum of the substance (K) of the evidence of each witness as the examination of the witness proceeds, and briefly record his reasons for his finding (L).

(4) Where the Mamlatdar's finding upon the issues is in favour of the plaintiff (M), he shall make such order, not being in excess (N) of the powers vested in him by section 5, as the circumstances

Orders to be passed by Mamlatdar upon decisions in favour of plaintiff and defendant.

Power of Mamlatdar to examine other witnesses and inspect property in dispute.

of the case appear to him to require ; and where his finding is in favour of the defendant, he shall dismiss the suit (O). In either case the costs of the suit (P), including the costs of execution, shall follow the decision.

Para 3 of Cl. (b) of sub-s. (1) and sub-s. 2 and 3 are new.

This Act does not require defendants to file written statements, nor is it contemplated by that Act that a written statement should ever be put in. The Mamlatdar is apparently expected by examination of the defendant, or his pleader, to ascertain what his defence is. But if in a rare case the Mamlatdar permits the defendant to file a written statement, there is nothing in the Court Fees Act that renders such a statement liable to a court-fee. If it takes the form of an application or petition, then under the second paragraph of clause (b), Article 1 of Schedule II of the last-named Act, it will be liable to a court-fee of 8 annas.—G. R. No. 1267, dated 11th February 1885, R. D. (See also Compilation of General Rules in force in the Revenue Department by the Remembrancer of Legal Affairs, Ed. of 1893, p. 346).

(A) "ON THE DAY FIXED."

That is, on the day fixed under *ante* s. 14, or the day to which the trial of the case is adjourned under *ante* s. 17.

(B) "SUBJECT TO THE PROVISIONS OF SECTION 16."

The Mamlatdar need not proceed to hear the evidence when he acts under sub-s. (1) of s. 16, or when the plaintiff withdraws his suit under the second proviso.

(C) HEAR ALL THE EVIDENCE THAT IS THEN AND THERE BEFORE HIM."

It must be observed that the Mamlatdar is to hear *all* the evidence which is "*then and there before him*." After taking the evidence of the witnesses present, he can take the evidence of the absent witnesses under sub-s. 2 of s. 17. Besides this the

Mamlatdar may examine any other witness under sub-s. 2 of this section.

Witnesses guilty of perjury may be dealt with according to s. 193 of the Indian Penal Code on the sanction of the Mamlatdar under s. 195 of the Code of Criminal Procedure, 1898.

[*Evidence offered by plaintiff as to user and obstruction—Duty of Mamlatdar.*] Held that a Mamlatdar having an impression from his examination of the parties unfavourable to the claim of the plaintiff to an injunction, was bound to take the evidence offered by the plaintiff as to the actual user and the nature and extent of the obstruction to it caused by the defendant.—**KESHAVA v. DAMODAR**, Prin. Judg. for 1887, p. 46.

[*Compromise of suit—Injunction—Material Irregularity.*] In a suit brought under the Mamlatdars' Courts Act the plaintiff stated that the matter had been compromised and that he was willing that the plaint should be dismissed and to bear his own costs. The defendant admitted this and that the plaintiff was in possession, but denied that he had obstructed the plaintiff's possession. On this the Mamlatdar recorded a finding that the plaintiff was in possession and that the defendant had obstructed it of which there was no evidence, and passed a decree for the plaintiff with costs. The High Court held that the Mamlatdar could only do this if he had evidence before him proving the defendant's obstruction, and therefore set aside his decree and dismissed the suit with costs. **SHIVDEVRAV RAGHUNATH v. BHAGVANTRAV NARSINH**, Prin. Judg. for 1895, p. 502.

[*Irregular decree made by consent of parties—Execution—Extraordinary jurisdiction of High Court—Questions of fact—Practice.*] The applicant brought two possessory suits against the opponent in the Mamlatdar's Court for the recovery of certain pieces of land. By consent, decrees were passed in these suits, that unless the opponent paid a certain sum of money to the applicant within two months, the latter should get possession. After the expiration of two months the applicant, alleging that the money had not been paid as agreed, applied for execution of the decrees. The Mamlatdar found that the money had been tendered to the applicant, but had been wrongfully refused by him. He ordered execution to issue as to costs, but declined to make any order as to posses-

sion. The applicant thereupon applied to the High Court in its extraordinary jurisdiction and alleged that the money had not been duly tendered. *Held*, that the decrees were such as the Mamlatdar could not legally make under the provisions of the Mamlatdar's Act (Bom. Act III of 1876), and the consent of parties could not give him power to do so.—*Held*, also, that the High Court would not go into the question as to the due tender of the money. It was not open to the High Court, in the exercise of its extraordinary jurisdiction, to go into this question of fact, nor would it be proper to further the execution of an irregular decree, especially as the applicant had a clear remedy by suit.—RAMRAO TATYAJI v. BABAJI DHONDJI, I. L. R. 20 Bom. 630; S. C. Prin. Judg. for 1895, p. 236.

[*Second dispossession within six months of first dispossession—Dismissal of suit.*] A decree for possession was made by a Mamlatdar in respect of a dispossession. Being obstructed by other parties while trying to take possession under the decree, the plaintiff filed within six months from the first dispossession a second suit for possession against them. The Mamlatdar having framed issues under s. 15 of Act III of 1876 without proceeding to try and determine them and without examining the plaintiff's witnesses, dismissed his suit on the technical ground that he was not in possession at the time the second dispossession took place. On application under extraordinary jurisdiction, the High Court, holding that the Mamlatdar failed to exercise the jurisdiction, with which he was vested, set aside his decree and directed him to pass a decree after proceeding to hear and determine the issues.—VIRAPPA SHIVLINGAPPA v. VIRBHADRAPPA BIN GURAPPA, Prin. Judg. for 1896, p. 593.

[*Transfer of case—Independent examination of each witness—Reading out evidence of one witness to another.*] The fact that there has been some slight disagreement between the Mamlatdar and the pleader for the defendants does not make it necessary for us to transfer the case, but we would point out to the Mamlatdar that it would be advisable for him to leave the examination of witnesses to the parties at any rate in the first instance, and that it was not a proper procedure for him to read out to one witness the evidence of another and ask him if he had anything to add to that evidence. Witnesses should be examined independently and made to tell their own story.—JIBHAI KASAN v. DESAI ACHALBHAI JADHAVBHAI, Prin. Judg. for 1896, p. 669.

Examination of witnesses not summoned by parties—Local inquiry—Notice to parties.] A Mamlatdar trying a possessory suit holding a local inquiry without notice to the parties and behind their backs is a grave and serious error in procedure.—*Sembie*.—That he has no power *proprio motu* to examine witnesses not summoned by the parties.—**KRISHNA BIN RAVJI v. VITHU BIN HANGU**, Prin. Judg. for 1896, p. 726.

[*Possessory suit—Perjury before Mamlatdar—Sanction—District Judge—Criminal Procedure Code, s. 195 (7) (c).]* A District Judge is authorised under s. 195 (7) (c) of the Criminal Procedure Code, to grant sanction for prosecution in respect of offences committed in the course of a possessory suit before a Mamlatdar.—**IN RE RAMCHANDRA SAMBHANJI KULKARNI**, 5 Bom. L. R. 206.

(D) "TRY THE FOLLOWING ISSUES."

Under s. 5 *ante* a plaintiff may bring a suit in the Mamlatdar's Court under the following three circumstances:—

(1) If he is unlawfully dispossessed of any property or deprived of any use.

(2) If he is entitled to the possession of any property or the restoration of any use by reason of the determination of any tenure or other right of the defendant relating thereto.

(3) If he is disturbed or obstructed, or an attempt has been made to disturb or obstruct him in his possession or use.

Consequently the law has framed three sets of issues to meet these three kinds of circumstances.

From the form of the notice required to be issued to the defendant by s. 14, from sub-s. 2 of s. 16, and from sub-s. 1 of s. 17, it is evident that the defendant is thereby called and required to *answer* to the plaintiff. This Act does not specify any particular *mode* in which a defendant is to answer. This answer may, therefore, be given orally or in writing. Under the Civil Procedure Code (Act XIV of 1882), s. 110 a de-

Defendant is allowed to put in a *written answer* as required by the summons issued under s. 64, and s. 112 gives power to the Court to compel a defendant to put in a *written answer*. This *written answer* is technically called a "*written statement*" in that Code and is required to be framed in the manner prescribed in ss. 114 and 115 of that Code. But the Civil Procedure Code does not apply to a Mamlatdar's Court (a). Therefore the *written answer* given by a defendant before a Mamlatdar cannot be designated by this technical expression. There is no provision in the Court Fees Act prescribing any fee either for the *written statement* mentioned in the Code of Civil Procedure or for the *written answer* under this Act. It must be observed that this *written answer* cannot be considered as an application. If the express words of an Act do not warrant or necessitate a demand of duty or charge, it is not competent to a Court of law to extend such enactment or to give to the words a meaning beyond their strict and literal signification so as to include any case which may reasonably come within the spirit of the enactment (b). An enactment imposing stamp duties upon the subject must be strictly construed (c). Fiscal enactments should, as far as possible, be construed in favour of the subject (d). In case of a doubt, the construction, most beneficial to the subject, is to be adopted.

It is impossible to anticipate every possible answer of the defendant in all cases which may come before a Mamlatdar. Consequently no particular issues can be framed by the Legislature so as to meet *every* possible case. Suppose, for instance,

(a) KASAM SAHEB v. MARUTI, I. L. R. 13 Bom. 552; S. C.,
Prin. Judg. for 1888, p. 294.

(b) IN RE THE PORT CANNING LAND COMPANY, Ltd., 16
W. R. C. R. 208.

(c) GIRDHAR v. GANPAT, 11 B. H. C. R.²⁰ A. C., 129;
EMPEROR v. SADDANAND, I. L. R. 8 Calc. 259.

(d) AMANAT BEGAM v. BHAJAN LALL, I. L. R. 8 ALL 438;
MEGHJI v. RAMJI, 8 B. H. C. R., O. C. 180; ANONYMOUS CASE, I.
L. R. 10 Calc. 282.

a defendant says that as the land in dispute is not situated in the taluka of the Mamlatdar, he has no jurisdiction to try the suit; then the Mamlatdar must frame an issue as to whether the Court has jurisdiction or not. So also if one party alleges that he is a minor or that a certain person is the legal representative of the deceased party, or that a certain person should be added as a party, and the other party denies this, then it becomes necessary to frame and decide the issues relating to these contentions. The Legislature have, however, framed certain issues with a view to indicate what a Mamlatdar has generally to try in the event of his proceeding with the case. He may, if necessary, under the circumstances of the case, make use of one or more of them. If a defendant appear before a Mamlatdar and admit the claim or say that he has delivered the land in dispute together with the costs of the suit to the plaintiff and the plaintiff also admits this, then there will be no necessity to frame any issue at all (see s. 16.) It will, therefore, be absurd to say that a Mamlatdar can try only the issues framed by the Legislature. This section does not say that a Mamlatdar should try the following issues *only*. He may adopt any of the issues framed by the Legislature, or may frame a new issue, or may not frame any issue at all, according as the occasion may require (a).

The Mamlatdar will conduct the summary inquiry as provided in s. 195 of the Bombay Land Revenue Code, 1879.

[*Mamlatdar's Court—Suit for injunction—Rights of riparian proprietors—Leakage water—Issues.*] Plaintiff was the owner of certain land (Survey No. 13) at the village of Loni, through which a stream of water flowed. In 1893 the Irrigation Department sought to levy leakage rates on the plaintiff's land (Survey No. 13), alleging that the water of the stream was derived by leakage and percolation from a certain canal called the Mula Mutha Canal. Plaintiff resisted this levy, contending that the water of the stream

(a) In *BALVANTRAO v. SPROTT*, I. L. R. 23 Bom. 761. Ranade, J. says "The Act itself lays down the issues that must be considered in such suits, and all matters not covered by these issues are extraneous, and ought not to influence the decision either way." This is, however, an *obiter dictum*.

was natural spring water and not canal leakage water. While the matter was under the consideration of Government, a neighbouring owner of land (Survey No. 17) at the suggestion of the irrigation officers erected a dam across the stream so as to prevent the stream flowing down to plaintiff's land (Survey No. 13). Thereupon plaintiff sued the owner of Survey No. 17 in the Mamlatdar's Court and obtained an order directing the dam to be removed and plaintiff's use of the stream to be restored. Under this order the dam was removed by the village officers on 4th June 1897. On the 8th June, the irrigation officers re-erected the dam in Survey No. 17 which had been removed in execution of the Mamlatdar's order, and again prevented the water of the stream from flowing on to plaintiff's field. Thereupon plaintiff filed the present suit in the Mamlatdar's Court, praying for an injunction against the Executive Engineer for Irrigation at Poona and three of his subordinates.

The defendants pleaded (*inter alia*) that the Mamlatdar's Court had no jurisdiction to try a suit brought against officers of Government for acts done by them in their official capacity, and that the plaintiffs had no right to sue.

The Mamlatdar held that he had jurisdiction to take cognizance of the suit against officers of Government. He further held, however, that as the water of the nala was canal leakage water, the Irrigation Department had a right to erect the dam and to give the sole use of the water to the occupant of Survey No. 17. He, therefore, dismissed the plaintiff's suit.

Against this decision plaintiff applied to the High Court under s. 622 of the Code of Civil Procedure (Act XIV of 1882) on the ground that the Mamlatdar had no authority to inquire into any other question save that of possession and obstruction, and that his inquiry into the source of the supply was *ultra vires*.

The High Court decided that the Mamlatdar went out of his way in considering the question of the course of water-supply, and basing his conclusion on the view he took of that source of supply. The Act itself lays down the issues that must be considered in such suits, and all matters not covered by these issues are extraneous, and ought not to influence the decision either way. The only issues the Mamlatdar had to consider were: (1) whether the plaintiff was in possession; (2) whether the defendants obstructed or disturbed that

possession; and (3) whether this disturbance was within six months before suit. The plea of justification set up on the ground of the source of the water-supply being leakage from the canal was not a point which could be pleaded in the Mamlatdar's Court.—BALVANT-RAO v. F. L. SPROTT Esq., EXECUTIVE ENGINEER FOR IRRIGATION, I. L. R. 23 Bom. 761.

(E) "DEPRIVED OF ANY USE."

Here the expression "any use" is very general, so as to include *every* possible use. But in s. 5 only specific uses are mentioned, and the Mamlatdar is said therein to have jurisdiction with respect to them *only*. One of the rules for the interpretation of statutes is that the general word which follows particular and specific words of the same nature as itself, takes its meaning from them, and is presumed to be restricted to the same genus as those words: or, in other words, as comprehending only things of the same kind as those designated by them; unless, of course, there be something to show that a wider sense was intended (a).

It is said to be a good rule of construction that, where an Act of Parliament begins with words which describe things or persons of an inferior degree and concludes with general words, the general words shall not be extended to any thing or person of a higher degree; that is to say, where a particular class (of persons or things) is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *cujusdem generis* with such class, the effect of general words, when they follow particular words, being thus restricted. The maxim of law is *Verba generalia restringuntur ad habilitatem rei vel aptitudinem personæ*, i. e. general words must be narrowed to the nature of the subject or the aptitude of the person (a).

(a) Maxwell's Interpretation of Statutes, 4th Ed., pp. 499-512.

(F) WHETHER THE PLAINTIFF OR ANY PERSON ON HIS BEHALF OR THROUGH WHOM HE CLAIMS WAS IN POSSESSION OR ENJOYMENT OF THE PROPERTY.

A plaintiff must be in *actual* possession. Constrictive or symbolical possession is not sufficient. He may be in possession by his agent, servant, any member of his family, or a friend. The possession of a tenant is not the possession of his landlord. Consequently if a tenant has physical possession and he be dispossessed by a third person, a landlord cannot maintain a suit to recover possession in a Mamlatdar's Court. So if a mortgagor refuse to put his mortgagee in actual possession of the immoveable property mortgaged by him in accordance with the conditions in the mortgage-deed, the latter cannot sue the former for possession under this Act.

After the natural or civil death of the person entitled to recover possession, his heir, executor, administrator or official assignee may bring a suit.

[*Suit for possession—Joining new party.*] Where B sued for possession in a Mamlatdar's Court and A alleged that B was her agent but that she had cancelled B's power, the Mamlatdar made B a co-plaintiff. Held that under Bombay Act III of 1876, A should not have been joined but B's suit should have been dismissed, as he had no right to sue.—BALWANT RAMKRISHNA BADVE v. AMBABAI, WIDOW OF NATHU PURSHOTTAM, Prin. Judg. for 1891, p. 350.

[*Suit for injunction—Subsequent forcible cutting of crop—Amendment of plaint.*] If in a suit by A in the Mamlatdar's Court for an injunction to restrain B from obstructing him in the possession of a field, process issues, but before the hearing B forcibly cuts and carries the crop of the field, the Mamlatdar should allow the plaint to be amended, and as regards the land, the proper issues would be those set forth in cl. (c), and as regards the crop, those set forth in cl. (a) of s. 15 of the Act.—(See G. R. N. 308 dated 13th January, 1887.)

[*Possession within six months before suit—Mortgagee's possession not on behalf of the mortgagor—Jurisdiction.*] Where the

(a) Broom's Legal Maxims, 7th Ed., p. 490; Wharton's Law Lexicon, 10th Ed., Col. 788.

plaintiff had been in actual possession of the lands up to the 14th November 1892, and from that date up to the date of dispossession by the defendant, plaintiff's mortgagee was in possession, the High Court held that the possession of the plaintiff's mortgagee after 14th November 1892 cannot be regarded as a possession "on his behalf" within the meaning of section 15 of Bombay Act III of 1876, and therefore, the plaintiff was not in possession six months before the suit, and the Mamlatdar had, therefore, no jurisdiction to entertain it.—*KHANDERAO v. NARSINGRAO*, I. L. R. 19 Bom. 289; S. C. Prin. Judg. for 1894, p. 130.

[*Possession of tenants—Dispossession of tenants by a third person—Possessory suit by lessor—Jurisdiction.*] The plaintiff, a lessor, is not entitled to sue under the first clause of section 4 of Bombay Act III of 1876 to recover possession of land leased to and in the occupation of his tenants, who were dispossessed otherwise than by due course of law by the defendant. *KHANDERAO v. NARSINGRAO*, Prin. Judg. for 1894, p. 130 followed.—*VOHRA UKA DADA v. BAI JIVI*, Prin. Judg. for 1894, p. 217.

[*Landlord and tenant—Dispossession of tenant—Possessory suit by landlord—Possession on behalf of landlord—Jurisdiction.*] A landlord who has let out his land to tenants cannot, on the tenants being dispossessed, bring a possessory suit in the Mamlatdar's Court under the provisions of the Mamlatdars' Act (Bombay Act III of 1876). The tenants cannot be said to be in possession "on behalf" of the landlord under s. 15, cl. (a) of the Act. The expression in its plain and natural meaning refers to actual possession by a servant or agent such as a steward or bailiff, and that this was the meaning in which it was intended to be used, derived confirmation from s. 4, which shows that the object of creating the Mamlatdar's Court was to give "immediate" possession, and also from the language of s. 18 which implies that the plaintiff, if successful, is to be put into immediate possession which is to continue until the plaintiff is ousted by a decree of the Court. The policy of the Act seems to have been to afford summary relief to the same persons as would have been entitled to sue in ejectment, that is, the persons legally entitled to the actual possession. The decision in Civil App. No. 81 of 1892 is overruled—*GOMA v. NARSINGRAO*, I. L. R. 20 Bom. 260; S. C. Prin. Judg. for 1895, p. 20. See

also BHIMAJI JAYAJI PATEL v. GOPALA MAHADU SALE, I. L. R. 20
Bom. 264, note.

[*Suit by landlord for possession—Tenant in actual possession—Decree for plaintiff—Jurisdiction.*] The plaint stated that the plaintiff was in possession, but the Mamlatdar found that the land in question was in the possession of a tenant of the plaintiff, and not in the possession of the plaintiff himself. *Held*, following GOMA v. NARSINGRAO, Prin. Judg. for 1895, p. 20, that the Mamlatdar had no jurisdiction to pass a decree for the plaintiff—KRISHNAJI WAMAN BHONDE v. DHANA MOTIRAM MARWADI, Prin. Judg. for 1895, p. 383.

(G) "WHETHER THE DEFENDANT IS IN POSSESSION OF THE PROPERTY, OR IN THE ENJOYMENT OF THE USE BY A RIGHT DERIVED FROM THE PLAINTIFF."

[*Fraudulent rent-note—Tenancy.*] Where a Mamlatdar decided that the rent note was not intended to be acted on, but only to be used to resist a possible claim by the husband's relations, and that no tenancy was therefore created; *Held* that it was within his jurisdiction to come to that conclusion.—PURBHUDAS LAKSHMIDAS v. FULBA, WIDOW OF VANSANG NAVALSANG, Prin. Judg. for 1892, p. 406.

[*Tenancy—Notice—Vagueness.*] *Held* that the Mamlatdar, by refusing to decide whether the tenancy had determined, has declined to exercise the jurisdiction expressly vested in him by s. 15 cl. (b) of Bombay Act III of 1876. If the rent-note created a tenancy which might be determined by due notice, there is nothing vague in its terms.—MOTILAL JUGALDAS VAKIL v. PEERKHAN VALAD RAHIMKHAN, Prin. Judg. for 1892, p. 407.

[*An unregistered kabulayat—Evidence.*] Where the Mamlatdar wrongly admitted in evidence an unregistered kabulayat, which, having regard to the definition of 'lease' given in section 2 of Act XX of 1866, required registration under section 20 of that Act, the High Court reversed the decree of the Mamlatdar and dismissed the plaint.—LAKSHMAN BIN KALAPPA PATEL v. NARAYEN RAGHUNATH KULKARNI, Prin. Judg. for 1893, p. 180.

[*Tenant denying landlord's title—Tenant can show that lease is determined by sale.*] In a possessory suit before a Mamlatdar

under Act III of 1876, though it is not competent to a tenant to deny his landlord's title at the date of his lease, it is open to him to show that it has since determined, *e. g.*, on account of a sale by the landlord to the tenant, in which case the tenant would no longer be holding under a title derived from the landlord:—**VEDU VALAD DUMANU v. NILKANTH VALAD VUJIR**, Prin. Judg. for 1896, p. 498.

[*Possessory suit to recover land let—Sale of the land to plaintiff by defendants after expiry of term—Findings on issues against plaintiff.*] As mortgagee in possession from the defendants the plaintiff let the mortgaged land to the defendants themselves under rent-note dated 19th June 1894 for 11 months. The defendants having refused to vacate after the expiry of the term, he sued them in the Mamlatdar's Court for possession. The Mamlatdar finding that after the expiry of the term the defendants sold the land to the plaintiff, found on both issues against the latter and rejected his claim. The High Court on an application under its extraordinary jurisdiction passed the following judgment:—

“We do not see how the fact, if fact it be, that the plaintiff purchased the land after the period fixed in the kabulayat for cultivation had expired, could justify the Mamlatdar in finding both the issues against the plaintiff. The plaintiff is the mortgagee, the defendants are his tenants. The Mamlatdar finds that the defendants are in possession by virtue of a right derived from the plaintiff, but he does not say whether that right has determined at any time within six months before suit was filed. We do not understand that the defendants plead any agreement under which their right to hold the land is prolonged. If there is no such agreement, and if the right has determined, a decree for plaintiff seems necessarily to follow. We reverse the order and direct the case to be re-tried.”—**SWARUPCHAND GOVINDJI v. LALBHAI NHANUBHAI**, Prin. Judg. for 1896, p. 533.

[*Suit for possession by assignee of mortgagee after expiry of lease to mortgagor—Jurisdiction.*] A Mamlatdar rejected, under s. 15 of Act III of 1876, a suit by the assignee of a mortgagee for possession against the mortgagors who had leased the lands from the mortgagee, but whose lease had expired. Held, that the defendants were holding by a right derived from a person through whom the plaintiff claimed, and that the Mamlatdar was in error

in declining jurisdiction.—MERWANJI MANCHERJI V. GANPATI BIN TUKARAM, Prin. Judg. for 1897, p. 418.

(H) "WHETHER THE PLAINTIFF OR ANY PERSON IN HIS BEHALF."

[*Servants of plaintiff drawing water from the well—Presumption.*] Where the question for consideration is whether the servants of the plaintiff are actually in enjoyment in his behalf of the use of water from the well, the mere circumstance that the persons who use the well are the plaintiff's servants, and live in his compound and draw water from the well is not sufficient to show that they use the well in his behalf. Servants in India generally make their own arrangements for food and water; and from the fact of the plaintiff's servants drawing water from the well no presumption arises that they draw it for their master. They may use the water entirely for their own purposes. If it is shown that they draw water to bring to the plaintiff's house for his household purposes, or to water the plaintiff's garden, or that, in any other way, they use the well on his behalf, then a finding to that effect would alone justify a finding on the first issue in the plaintiff's favour.—GOVIND KAMALA PATEL DANDEKAR V. FRANK CHALK, Prin. Judg. for 1888, p. 301.

[*Actual possession—Symbolical possession—Obstruction to possession—Suit for injunction.*] In June 1894, the applicant brought a possessory suit (No. 34) in the Mamlatdar's Court and obtained against the opponent a decree for possession of a certain piece of land which had then been built upon by the opponent, and on 4th April 1895, the Talati put him in possession of it. In October 1895, the opponent brought suit (No. 26) against the applicant in respect of the same land for injunction, alleging that he was in possession. The Mamlatdar held that the possession given to the applicant in execution of the decree of 1894 was only symbolical, and that the actual possession was with the opponent. He, therefore, ordered that an injunction be issued requiring the applicant to refrain from causing or attempting to cause any obstruction to the opponent's possession. Against this order the applicant made an application under extraordinary jurisdiction and the High Court pronounced the following—

JUDGMENT.—The Mamlatdar in this case was in error in holding that possession was not actually given by the Talati to the defendant. It appears that the Talati went to the ground in dispute (a passage or gali between two houses) and walking upon the otta which adjoined it, as he could not by reason of the debris in the passage walk on the land itself, told the defendant to take possession which she did by stepping on to the debris. This appears to us to amount to giving actual and not merely symbolical possession of the land. The defendant being thus in possession, the facts that the plaintiff went again on the land and committed acts of user upon it were simply acts of trespass on his part and did not restore to him the possession which he had previously enjoyed. The Mamlatdar's error in holding that the lady did not obtain actual possession induced him to give to these acts of trespass a force which they had not in law. They might have been evidence of possession if there was a real dispute as to who was in possession, but are not sufficient to deprive the defendant of her actual possession and restore it to the plaintiff. We set aside the order with costs.—**Roza Maria Henriques v. Lakshman Krishna Samant**, Prin. Judg. for 1896, p. 230.

(I) "DISTURBING OR OBSTRUCTING OR HAS ATTEMPTED TO DISTURB OR OBSTRUCT."

[*Disturbance of possession—Pulling up a thorn hedge—Suit for injunction.*] The plaintiff sued in the Mamlatdar's Court for an injunction restraining the defendant from disturbing him in the possession of his land on which he had put up a thorn hedge, which the defendant had pulled up. The Mamlatdar without finding whether the defendant had disturbed the plaintiff in his possession of the property, rejected the claim on the ground that, if the defendant had pulled up the hedge, he had done so legally, as the plaintiff had by an agreement entered into in 1856-57, engaged to maintain a live hedge and not a hedge of thorns. On an application by the plaintiff the High Court held that the Mamlatdar had no jurisdiction to try any question as to the legality of the alleged disturbance. He should have raised and considered only the issues prescribed by cl. (c) of s. 15 of Bombay Act III of 1876. The second of those issues deals only with the question of fact whether or not a disturbance or obstruction has been caused or attempted; not with any

question as to its legality. If the question of fact is found against a defendant, the only remaining question to be determined with reference to the alleged disturbance or obstruction is that referred to in the third of the prescribed issues. The Mamlatdar's order was, therefore, reversed and the case was remanded for a fresh decision on the merits.—GANESH JAYARAM JOSHI v. RAMCHANDRA GOPAL JOSHI, Prin. Judg. for 1891, p. 96.

(J) "SUMMON AND EXAMINE."

This sub-section confers upon the Mamlatdar three necessary and important powers, which he did not possess under the former Act, namely :—

- (1) To summon and examine any person as a witness.
- (2) To call for and cause to be proved any document.
- (3) To make a *personal inspection* of the property.

This provision is analogous to s. 171 of the Civil Procedure Code, 1882, and to s. 540 of the Criminal Procedure Code, 1898.

[*Mamlatdar—Examination of witnesses not summoned by the parties—Local inquiry—Notice to parties.*] A Mamlatdar trying a possessory suit holding a local inquiry without notice to the parties and behind their backs is a grave and serious error in procedure. It seems that he has no power *proprio motu* to examine witnesses not summoned by the parties.—KRISHNA BIN RAVJI NALAVDE v. VITHU BIN HANGU, Prin. Judg. for 1896, p. 726.

[*Mamlatdar—Local inquiry—Notice to parties—Material irregularity.*] It is a material irregularity in the Mamlatdar's procedure to make, without notice to the parties, inquiries on the spot of several villagers without keeping any legal record thereof. It is not, however, meant that he may not, in the absence of the parties and without notice to them, inspect the property in suit if he thinks it necessary to do so. But he cannot allow his mind to be influenced by the statements made to him on the spot in the absence of the parties.—DARI BIN SHETI KUMBHAR v. REVUBAI KOM. RAMA KUMBHAR, 2 Bom. L. R. 138.

**(K) "A MEMORANDUM OF THE
SUBSTANCE."**

This provision corresponds to s. 189 of the Civil Procedure Code, 1882, and to s. 355 of the Criminal Procedure Code, 1898.

A Mamlatdar trying a suit under Bombay Act III of 1876 may, if he sees sufficient cause, direct any document or book produced to be impounded and kept in the custody of an officer of the Court for such period and subject to such conditions as he thinks fit. After the decision any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record, shall, unless the document has been impounded by the Court, be entitled to receive back the same, provided that the document may be returned at any time before the decision of the suit, if the person applying for such return deliver to the Court a certified copy of such document to be substituted for the original. On the return of a document which has been admitted in evidence, a receipt shall be given by the party receiving it in a receipt-book to be kept for that purpose (a).

The practice of recording the issues and findings apart from the judgment is one which causes great inconvenience and should be discontinued. Distinct issues and findings should be recorded in every case and incorporated in the judgment (b).

The records of suits in Mamlatdar's Courts, under Bombay Act III of 1876, may be destroyed after the expiration of 6 years from the date of final decision. The registers in which such suits have been entered will be permanently preserved, and a book should be kept, showing the numbers and years of the suits of which the records have been destroyed. The records of the older suits should be destroyed first (c).

(L) "REASONS FOR HIS FINDING."

If no reasons are given, the finding will be illegal.

(a) The Bombay H. Ct. Civ. Cir. Or. (1903), p. 27.

(b) *Ibid.*

(c) *Ibid.*, p. 82 ; and Bombay Act I of 1904, s. 9.

(M) " WHERE THE MAMLATDAR'S FINDING
UPON THE ISSUES IS IN FAVOUR OF THE
PLAINTIFF. "

[*Suit for injunction—Obstruction by some of the defendants—Award of partial claim—Jurisdiction.*] The plaintiff's suit to have the defendants restrained by injunction from causing disturbance to him in cultivating his fields was rejected by the Mamlatdar, on the ground that his allegations were not proved against all the defendants, one of the defendants having been found not to have disturbed the plaintiff. *Held*, reversing the order of the Mamlatdar, that there was nothing in the Mamlatdars' Act III of 1876 to prevent the Mamlatdar from granting the injunction as against the defendants against whom the case was proved. The High Court directed an injunction to go under section 4 of the Mamlatdars' Act, restraining the said defendants from causing the alleged disturbance to the plaintiff (*KASHIRAM v. NARAYAN*, Prin. Judg. for 1888, p. 102 followed).—*CHINTAMANRAO NARAYAN GOLE v. BALA et al*, I. L. R. 14 Bom. 17 ; S. C. Prin. Judg. for 1889, p. 46.

[*Suit for possession of land—Huts on the land—Award of partial claim.*] When the land of which the plaintiffs claimed possession had upon it huts to which they were not entitled, and the Mamlatdar dismissed the suit because he could not wholly allow the plaintiffs' claim, it was held that it was not a valid ground for refusing to make a decree to which the plaintiffs were entitled in respect of the land which was in their possession at any time during the six months preceding the suit and of which they were wrongfully dispossessed.—*KASHIRAM VISHNU KAMAT v. NARAYAN GOPAL*, Prin. Judg. for 1888, p. 102.

[*Finding partly in favour of plaintiff—Procedure.*] Where the Mamlatdar found on the two issues laid down in s. 15 (a) of Bombay Act III of 1876 in favour of the plaintiff as regards the land claimed and in favour of the defendants as regards the mango trees, it was held that he ought to have made a decree allowing plaintiff's claim to the land and disallowing it as to the trees. He had no jurisdiction to go into a question of title, and refuse to award the plaintiff the whole of the land claimed, because from a construction of the terms of the sale-deed and a personal inspection,

of the land, the whole of it had not, in his opinion, been sold to the plaintiff.—**NAGAR VASAN v. JAGAN DULABH**, Prin. Judg. for 1891, p. 193.

[*Joint tenants—Suit against one of them—Procedure.*] Where a Mamlatdar rejected a claim in a possessory suit without taking evidence on the ground that the suit would not lie as the opponent was one of two joint tenants, the other of whom was not sued; *Held*, that the claim could only have been rejected if, after taking evidence, it had been found that the opponent was not in possession by a right derived from the applicants, but that if the opponent was in possession under a lease granted by applicants to opponent and another person which had expired within six months of the filing of the suit, applicants would be entitled to possession as against opponent even though the other tenant was not sued.—**ANTAJI NARSINH v. TUKARAM BIN NATHAJI**, Prin. Judg. for 1891 p. 99.

[*Compromise of suit—Injunction—Irregularity.*] In a suit, brought under the Mamlatdars' Courts Act the plaintiff stated that the matter had been compromised and that he was willing that the plaintiff should be dismissed and to bear his own costs. The defendant admitted this and that the plaintiff was in possession, but denied that he had obstructed the plaintiff's possession. On this the Mamlatdar recorded a finding that the plaintiff was in possession and that the defendant had obstructed it, and passed a decree for the plaintiff with costs. On an application under extraordinary jurisdiction the High Court held that the Mamlatdar had acted with material irregularity, set aside his decree, and dismissed the suit with costs, remarking that he could only do this if he had evidence before him proving the defendant's obstruction and in any case ought not to have awarded costs against the defendants.—**SHIV-DEVRAO RAGHUNATH VINCHURKAR v. BHAGVANTRAO NARSINH VINCHURKAR**, Prin. Judg. for 1895, p. 502.

(N) "NOT BEING IN EXCESS."

For instance, if the circumstances of the case require a Mamlatdar to issue a mandatory injunction to grant proper relief to the plaintiff, he cannot do so; for under s. 5 he has no power to do so.

(O) "HE SHALL DISMISS THE SUIT."

[*Possession of Math—Dismissal of suit—Mamlatdar's power to make further order.*] Gunpat brought a suit against Ganesh under Bombay Act III of 1876 to recover possession of a *Math*. The Mahalkari of Parola found that the *Math* was not in the possession of any of the parties, and that it was public property. He, therefore, decided the suit by ordering the Police Patil to take possession of the *Math*. Against this order Ganesh applied to the High Court under its extraordinary jurisdiction. The High Court decided that in disposing of the plaintiff's suit the Mahalkari's jurisdiction was confined to determining whether the plaintiff was obstructed by the defendant when in possession of the *Math*. Having dismissed the suit, his jurisdiction ceased, and he could not make any further order in the matter authorising the Police Patil to take possession as against the defendant. That part of the order is without jurisdiction.—*GANESH NATH v. GANPAT*, Prin. Judg. for 1895, p. 56.

(P) "COSTS OF THE SUIT."

It is not in the discretion of the Mamlatdar to award costs in the way he thinks best, but the costs will invariably follow the decision.

The Bombay High Court has issued a circular to the effect that the fee to be allowed to a pleader in suits before Mamlatdar's Courts is ordinarily to be Rs. 5, subject to increase by special order to a sum not exceeding Rs. 15.—See *Bombay Government Gazette* for 1884, Part I, p. 605.

20. Every order of the Mamlatdar, whether

Mamlatdar's order to be endorsed on plaint and read out in open Court, for rejecting or returning a plaint (A) or whether for allowing or disallowing a claim (B), shall be endorsed by the Mamlatdar on the plaint and shall be read out (C) by him in open Court, either at once or on some future day of which due notice shall be given to the parties or their pleaders (D), and brief reasons for the order shall be placed by him on record.

(A) "WHETHER FOR REJECTING OR RETURNING A PLAINT."

A plaint is *rejected* under ss. 12 and 16, sub-s. 1. It is returned under s. 13. In any of these cases the order must be endorsed on the plaint.

(B) "WHETHER FOR ALLOWING OR DISALLOWING A CLAIM."

After taking evidence on the issues given in s. 19, the Mamlatdar passes his decision thereon, and he may either allow the claim or disallow it. In either case the order passed by him must be endorsed on the plaint.

From the wording of this section one may consider that a Mamlatdar must either allow the *whole* claim or disallow it *altogether*, and that he has no power to grant partial relief. But it is not so. The maxim of law is *omne maius continet in se minus*, *i.e.*, the greater contains the less. Applying this rule it follows that a Mamlatdar can allow the whole or any portion of the claim that is proved by the evidence in the case. Suppose, for instance, that a plaintiff seeks to recover the possession of ten acres of land or to have the use of the water from ten wells to be restored to him, but the evidence proves that he has been dispossessed of only six acres of land or that he has been deprived of the use of water from six wells, the Mamlatdar can grant him relief to the extent of six acres of land in the former case and the use of water from six wells in the latter case. Again suppose that a plaintiff says that his possession of the land or enjoyment of the use was obstructed or disturbed by twenty persons, but the evidence shows that only sixteen persons did so, the Mamlatdar may issue an injunction to those sixteen persons only. It is said in s. 19, sub-s. 4, that a Mamlatdar shall pass such order as the circumstances of the case appear to him to require.

(C) "SHALL BE READ OUT."

The order endorsed on the plaint will be *illegal* in the following cases:—

- (1) If the order is endorsed on the plaint but not *read out*;
- (2) if it is not read out *in open Court*,
- (3) if it is read out on some future day without giving such *notice* to the plaintiff and the defendant as is required by law.

Any such illegality may be proved by one or more affidavits.

(D) "OR THEIR PLEADERS."

There is no reason why recognised agents are not mentioned.

21. (1) Where the Mamlatdar's decision (A)

Mamlatdar's decision is for awarding possession or re-storing a use, he shall give effect how executed. thereto by issuing such orders

(B) to the village-officers, or to any subordinate (C) under his control, or otherwise, as he thinks fit :

provided that, notwithstanding anything contained in this Act, where, at the time when a decision is recorded by the Mamlatdar for awarding

Proviso as to growing crops. possession of any land, there is a crop on such land (D) which has been sown by, or at the expense of, the defendant, and the Mamlatdar is satisfied that it has been so sown in good faith (E), the Mamlatdar may, and if the defendant makes an application for the purpose and furnishes sufficient security, or deposits in Court a sufficient sum, for the payment of the costs of the suit, shall pass an order staying delivery of possession of such land to the plaintiff seeking possession thereof, either

- (a) until the plaintiff agrees to take the crop at a valuation, to be made under the orders of the

Mamlatdar, according to the value of the crop at such time, including any instalments of the Government assessment which the defendant may have paid for the current year ; or

(b) where the plaintiff is unwilling to take the crop at such valuation, until after the expiration of sufficient time for the crop to be gathered by the defendant.

The amount of any valuation made under clause (a) of the proviso to this sub-section shall be paid to the defendant through the Mamlatdar, and shall be recoverable from the plaintiff as an arrear of land-revenue (F).

(2) Where the Mamlatdar's decision is for granting an injunction, he shall Mode of serving in- cause the same to be prepared junction. in the form of schedule C (G), and shall deliver or tender the same then and there to the defendant, if present, or, if the defendant is not present, shall send it to the village-officers, or to any subordinate under his control, to be served upon the defendant.

(3) Where the Mamlatdar awards costs (H), such costs (I), together with the Recovery of costs costs of execution (J), shall be awarded. recoverable from the party ordered to pay them as an arrear of land-revenue (K).

(4) Any person disobeying (K) an injunction granted under sub-section (2) Disobedience to an in- junction how punishable. shall be punishable under section 188 (L) of the Indian Penal Code.

(A) "THE MAMLATDAR'S DECISION."

It is very important to note that the word "*decision*" is used in this section. The word *decision* is not defined in this, Act. Its legal meaning is a judgment (a).

It must be specially noted that the word *decree* is not used anywhere in this Act. Consequently persons who are well acquainted with the Civil Procedure Code and who have frequent occasions to follow its procedure, and who have not paid special attention to the provisions of this Act, and who find that the word "*executed*" is used in the marginal note, to sub-s. 1 of this section, and the word "*execution*" is used in s. 19, sub-s. 4 and in sub-s. 3 of this section, are liable to fall into the error of supposing a Mamlatdar's decision to be a decree. They might think that in order to execute a Mamlatdar's decision the party in whose favour the decision is passed, must make an *application* to the Mamlatdar as is done under the Civil Procedure Code, and that the period of limitation prescribed in the Indian Limitation Act must apply to it. When they start with this understanding and when they do not find in this Act any provisions similar to those in the Civil Procedure Code, they naturally have recourse to the application of the provisions of that Code. But on a little reflection it will be seen that from the wording of this section this Act does not contemplate an *application* for execution, and no question can, therefore, arise regarding the period of limitation. What this section requires is that when the Mamlatdar pronounces his decision, he must at once issue an order to the Village Officers, &c. to enforce his order for awarding possession or restoring a use; and if his order be for granting an injunction, then he must serve it on the defendant then and there, if he be present, but if he be not present in Court, he must send it to the Village Officers, &c. for service (b).

(a) Wharton's Law Lexicon, 10th Ed.

(b) G. R. No. 5272 dated 4th August says that Article 179 of Schedule II of the Limitation Act (XV of 1877) applies to the execution of decrees or orders made by the Mamlatdar. But this Art. applies to an *application* for execution.

[*Decree in possessory suit in Mamlatdar's Court—Execution of decree stayed by proceedings in Subordinate Judge's Court—Suit in Subordinate Judge's Court ultimately dismissed—Subsequent application to Mamlatdar for execution of decree in possessory suit—Limitation—Deduction of time spent on proceedings in second suit—Act XV of 1877, s. 14.*] In possessory suit No. 57 of 1884 in the Court of the Mamlatdar of Chorasi the applicant obtained a decree for possession of the land in dispute against defendants. The opponents then sued him in the Court of the First Class Subordinate Judge at Surat to obtain a declaration that the land was theirs, and an injunction restraining him from obstructing him in the enjoyment of their rights, and on the 17th January, 1885, the First Class Subordinate Judge, on their application, stayed the execution of the decree obtained by the applicant in the Mamlatdar's Court.

On 26th January, 1886, the opponents' said suit was dismissed by the Subordinate Judge, but in appeal the District Judge on 22nd December, 1887, partially awarded their claim. Against this decree the applicant (i. e. the defendant in that case) appealed to the High Court, which remanded the case to the District Judge. The District Judge, however, adhered to his previous decision, and on 23rd December 1889, passed a decree similar to that which he had passed on the 22nd December, 1887. The applicant again appealed to the High Court, which on the 22nd April, 1891, reversed the decree of the District Judge and restored the decree of the Subordinate Judge dismissing the suit. The applicant then on the 15th March 1892, applied to the Mamlatdar for execution of the decree passed in his favour in possessory suit No. 57 of 1884, but the Mamlatdar on 17th December, 1892, made the following order :—

" You are informed that the decree of the Court of the First Class Subordinate Judge having been confirmed by the Honourable the High Court, the said decree cannot be (order to be) executed by this Court. If you like, you may take steps for the same in the Civil Court. "

The applicant thereupon applied to the High Court under its extraordinary jurisdiction, and the following judgment was passed :—

"SARGENT, C. J.:—The Mamlatdar was wrong in holding that the decree of the High Court confirming that of the Subordinate Judge prevented his executing the order passed by him in the possessory suit on the 17th December 1884. That decree had the effect of dismissing the opponent's suit, by which they asked for a declaration that the land in question was their property, and for an injunction to restrain the present applicant from obstructing them and left matters altogether as they were under the Mamlatdar's order. That order, therefore, remains to be executed, unless barred by article 179 of the Limitation Act. If the periods during which the interlocutory judgment of the Subordinate Judge passed on 17th January, 1885, and the decree of the District Court on 22nd December, 1887, were in force be omitted, the order would have been in force for less than three years when the application to the Mamlatdar to enforce his order for possession was actually made. See section 14 of the Statute of Limitation and *Hira Lale v. Budri Dass* (L. R., 7 Ind. App. 167) which makes it applicable to proceedings in execution. We must, therefore, in the exercise of our extraordinary jurisdiction, discharge the order of the Mamlatdar and direct him to execute his order of 17th December, 1884, by putting the applicant in possession—*Navalchand Nemichand v. Amichand Talachand*, I. L. R. 18 Bom. 734; S. C. Prin. Judg. for 1893, p. 528.

Government in their Resolution No. 1673 dated 11th March 1882 had ruled that the decision of the Mamlatdar under Act III of 1876 is good not only against the defendant, but the whole world. But this ruling has been subsequently cancelled by their Resolution No. 2893, dated 15th April 1886. The effect of its cancellation being that the decision of the Mamlatdar is binding only upon the parties to it. This latter view is supported by the decisions of the Bombay High Court noted below.

[*Mamlatdar's decision in possessory suit—Application for execution—Limitation.*] Where a Mamlatdar's decision awards possession, s. 17 of the Mamlatdars' Courts Act (Bombay Act III of 1876) imposes on him the duty to issue an order to the village officers to give effect thereto. That duty is in no sense conditional on an application being made to the Mamlatdar for the purpose; it is

absolute and unqualified. If it be brought to the notice of the Mamlatdar that the duty thus imposed upon him has not been carried out, that is not an application without which the Mamlatdar could not act ; it is merely a means of apprising the Mamlatdar of the omission on the part of himself or his officers. There is a long line of authorities in India, whereby it is established that where an imperative duty of the character described above is imposed upon a Court, then the Limitation Act has no application.—*BALAJI v. KUSHABA, I. L. R. 30 Bom. 415 ; S. C. 8 Bom. L. R. 218.*

**(B) "HE SHALL GIVE EFFECT THERETO
BY ISSUING SUCH ORDERS."**

In Bombay Act V of 1864, there was no machinery for enforcing the Mamlatdar's awards, but the Bombay Act III of 1876 provided for their execution through the village officers. It was thought undesirable to entrust these officers with the execution work. It was urged that local feeling in village communities was in itself a sufficient reason why village officers should not be asked to carry out the Mamlatdar's awards ; and that moreover the village officers might be dealing largely with land &c., in their villages, and might have to act as bailiffs in cases in which they were themselves concerned. But it was thought unadvisable not to trust the village organisation to carry out the Mamlatdar's awards, when the same organisation was entrusted with matters of revenue. It was said that if the Patel does not carry out the orders of the Mamlatdar, the Collector can deal with him as a person guilty of misconduct in the execution of his duty.

[*Decision in possessory suit—Execution by Mamlatdar—Execution after plaintiff's death—High Court's extraordinary jurisdiction.*] Where the Mamlatdar receiving, on 9th September, 1895, the High Court's order in a possessory suit which he had decided, allowed that order to remain unexecuted up to the 2nd October following and granted execution on that date in spite of the defendant's application bringing to his notice that the plaintiff (in whose favour the order had to be executed) was then dead ; *Held*, that on receipt of the High Court's order the Mamlatdar ought

to have, of his own accord, at once delivered his order to the defendant if he was present, or if he was not present, sent it to the village officers for execution. As, however, the Mamlatdar's delay in performing his duty ought not to prejudice any one, and as, if he had issued his order at the proper time, the heirs of the deceased plaintiff would now be in the enjoyment of the benefits accruing from it, the High Court thought that in extraordinary jurisdiction it ought not to deprive the plaintiff's heirs of the benefits which they had obtained by the Mamlatdar's proceeding at the late stage that he had done, and declined to interfere.—BHAGWANLAL GOPALRAI v. CHHABILBHAI, Prin. Judg. for 1896, p. 600.

[*Mamlatdar's decision—Execution—Directions of Collector to Mamlatdar—Power of Mamlatdar.*] A Mamlatdar having under the direction of the Collector executed a decree passed by himself directing the removal of a dam.—*Held* that though it might be improper for the Collector to issue such direction, which legally could only issue from the High Court, the High Court would not set aside the execution if otherwise valid. Section 17 of the Mamlatdars' Act (III of 1876) is imperative, and leaves to the Mamlatdar no discretion as to the duty of enforcing the decree. The Act does not purport to provide detailed rules as to application for execution, and a Mamlatdar's Court is not governed as to execution of decree by the ordinary rules of procedure; and provided the procedure followed gives effect in the end to the intention of S. 17, the Court will not interfere.—*Held*, also, that under S. 17 of the Mamlatdars' Act (III of 1876) a Mamlatdar was not precluded from himself supervising the execution of a decree in a case in which the village officers were from interest or other cause unlikely to give proper effect to it.—RAKHANA VALAD JAVJI v. TULAJI VALAD RAMJI, I. L. R. 19 Bom. 675; S. C. Prin. Judg. for 1894, p. 390.

[*Alienated village—Services of village officers.*] The Collector of Surat raises the question whether the village officers of alienated village are bound under s. 17 of Bombay Act III of 1876 to give effect to decisions under that Act. He remarks that except the Police Patel, village servants in such villages are mere private servants of the inamdar. It is questioned whether village officer from neighbouring Government villages can legally give effect to decisions under the Act.

2. The difficulty does not seem to arise elsewhere than in Guzerat, as village officers are generally available, and in Kolaba execution is entrusted, where there are no other officers to answer the description, to the talati to whose ' Saza ' the inam village is for other purposes (e. g. for Vital Records) attached.

3. The Police Patel, it appears, is always available even in Surat and he is bound to give effect to the order, and if necessary, to use force in so doing. ' The village officers are acting in disobedience of the Mamlatdar's order to give effect to his decree if they refrain from all action on the mere objection of the losing party.' If the viliage establishment is insufficient, they should apply to the Mamlatdar whose duty it would be to represent to the higher officers of Government any necessity which might exist for the employment of any force not available on the spot to carry out the decree of the Court. (a).

4. Apparently if the village staff were inadequate, the village officer might be authorized to give effect to the order by such agency as might be placed under his orders for the purpose. It is not necessary that the village officer should give possession with his own hands. It is his duty to ' give effect to ' the order and a door, if necessary, may be broken open or other force used for the purpose (b).

5. When an Act confers a jurisdiction, it impliedly grants also the power of doing all such acts or employing all such means as are essentially necessary to its execution (c).

6. If there is no hereditary village officer, it is competent to a Collector to appoint a stipendiary Patel or village accountant who shall perform all the duties of an hereditary Patel or village accountant ' as prescribed in any law for the time being in force ' (S. 16, Bombay Land Revenue Code, 1879). It is provided of course that such appointment should not affect any rights of holders of alienated villages in respect of the appointment of the Patels. And therefore it would not be competent to a Collector to supersede any Patel whom an inamdar has of right appointed.

(a) I. L. R. 15 Bom. 159.

(b) 5 B. H. C. R. A. C. J. 158.

(c) Maxwell on interpretation of Statutes, 2nd Ed., p. 433.

7. But it is legal and evidently customary to appoint for purposes which the inamdar's nominee is not intended to fulfil, such as the preparation of Vital Registers, and such matters of general administration ; and an officer so appointed might combine his duties in the alienated village with duties in other villages. A Talati, to whose ' Saza ' an alienated village is attached for such purposes, as in Kolaba, appears therefore to be legally competent as a village officer to give, when required, effect to a decree of a Mamlatdar's Court, and for that purpose to use such means as he may be directed and such force as may be necessary.

8. It does not appear in what way village servants in alienated villages are or have become mere private servants of the inamdar.

9. If watandars, even though under s. 17, Bombay Act III of 1874, payable and nominated by inamdar, they would, it seems, be legally bound to render such service as is required by law (S. 69, Bombay Act III of 1874).

10. Government could in such villages confer on the holder of the village or on any agent of his all or any of the powers and duties of a Commissioner or Collector under that Act, subject to such conditions as the Governor in Council shall think fit to prescribe (a).

11. The Act, though it guards the rights of holders of alienated villages, does not do away with the duties required by law from hereditary officers in such villages.

12. Bombay Act III of 1874 extends to ' alienated villages ' ' so far as its provisions shall not conflict with the terms on which any such alienated village may have been secured to the holder thereof ' (b). But there is nothing to show that it contemplated the conversion into mere private servants of the inamdar, of hereditary village servants holding office ' connected with * * matters of, civil administration ' (c).—G. R. No. 5626, dated 9th July 1892

R. D.

(a) S. 84 as amended by Bombay Act V of 1886.

(b) Section 1.

(c) Section 4.

(C) "OR TO ANY SUBORDINATE."

These words are intended to provide some means of giving effect to decisions other than through the agency of the village-officers, who are often interested, and even partisans, on one side or the other.

Use of force.

[*Breaking open a door.*] A Court authorized under Act V of 1864 (Bombay) to give immediate possession of lands and premises has the power to direct the breaking open of a door when necessary to give effect to its decree.—BAJI DEO v. SADASHIV BHAISHANKAR, 5 B. H. C. R. A. C. J. 158.

[*Use of force to eject the person.*] When a Mamlatdar passes a decree for possession, it is his duty under section 17, not merely to issue orders to the village officers to execute the decree, but also to see that effect is really given to his decision. For this purpose he may use force, if necessary, to eject the person against whom the decree is passed.—SHANKAR RAMLAL DIKSHIT v. MANTANDRAO BHAU TIPNIS, I. L. R. 14 Bom. 157 ; S. C. Prin. Judg. for 1889, p. 167.

Building on Land.

A Mamlatdar's order in a possession suit, permissive as to the removal of a house, imperative as to the delivery of the site, is such an one as can be enforced. The owner of the house can remove it if he likes. Prin. Judg. for 1875, p. 287.

Dispossession of third person.

The maxim of law is *Res inter alios acta alteri nocere non debet*, i. e., a transaction between two parties ought not to operate to the disadvantage of a third (a). In a leading case (b), immediately connected with this subject, it is laid down by the judges, as a general principle, that a transaction between two parties in judicial proceedings ought not to be binding upon a third ; for it would be unjust to bind any person who could not be admitted to make a defence, to examine and cross-examine

(a) Broom's Legal Maxims, 7th Ed., p. 731.

(b) See the Duchess of Kingston's case. 2 Smith L. C., 10th ed. 713.

witnesses, or to appeal from a judgment, which he might think erroneous. Hence the decision of a Mamlatdar is not binding upon a third person who is not a party to the proceeding, and it cannot therefore be enforced against him. If, therefore, a third person is dispossessed in execution of a Mamlatdar's decision, the dispossession will be "*otherwise than by due course of law*," and the person so dispossessed may recover possession by a suit before a Mamlatdar under s. 5 of this Act or by a regular suit in a Civil Court either founded on possession under s. 9 of the Specific Relief Act (I of 1877) or based upon title.

If *after* the adjudication upon the issues by the Mamlatdar, but *before* the execution of his decision, the defendant *bonâ fide* or even with a view to delay or obstruct the execution of a decision, allow a person, who is not a party to the suit, to take possession of the property in dispute, the Mamlatdar's decision will be fruitless; for after adjudication upon the issues he cannot add such third person as a party under sub-s. 2 of s. 18, nor has he power to oust such third person from his possession, though fraudulent.

[*Dispossession of third person in execution of Mamlatdar's decision—Remedy for third person—Civil Procedure Code not applicable—Special procedure.*] Bombay Act III of 1876 provides a special procedure for Mamlatdars' Courts; and there is no indication in the Act of any intention that the rules of the Code of Civil Procedure shall apply to cases for which the special procedure makes no provision.

Sections 17 and 18 of the Act, which relate to the execution of Mamlatdars' decrees, cannot be supplemented, as to matters not referred to in those sections, by any of the provisions of the Code relating to the execution of decrees of Civil Courts.

Though the Mamlatdars' Courts, as constituted under Bombay Act III of 1876, are Civil Courts, subject to the revisional jurisdiction of the High Court, it does not follow that the provisions of the Code of Civil Procedure are generally applicable to those Courts.

Where a person is dispossessed in execution of a Mamlatdar's decree against a third party, his proper remedy is by a suit, and not

by a miscellaneous application.—KASAM SAHEB VALAD SHA AHMED SAHEB v. MARUTI BIN RAMBHANJI, I. L. R. 13 Bom. 552; S. C. Prin. Judg. for 1888, p. 294.

[*Suit for injunction—Person dispossessed in execution of decision—His remedy by suit or application under Section 332 of the Code of Civil Procedure.*] One Jinabhai Ratanji filed a suit in the Mamlatdar's Court for an injunction restraining the defendants from obstructing him in his possession and enjoyment of certain lands. The Mamlatdar found that the defendants had obtained possession through the Civil Court in execution of a decree against a third person. But he was of opinion that the possession had been improperly obtained, as the bailiff, who executed the decree, had made no inquiry whatever of the village officers as to ownership of the lands in question. He, therefore, granted the injunction prayed for. Against this decision the defendants applied to the High Court under section 622 of the Code of Civil Procedure (Act XIV of 1882). The judgment of the High Court was delivered by—

“ BIRDWOOD, J. :—The suit in the Mamlatdar's Court was one falling under clause (c) of Section 15 of Bombay Act III of 1876; and the first issue in it was whether the plaintiff was in possession at the time of the suit, he was actually in possession of the property claimed. Unless he was in possession at the time of the suit, he could not obtain any relief under clause (c). The Mamlatdar found that he had, as a matter of fact, been dispossessed before the filing of the suit by a bailiff of a Civil Court in the execution of a decree obtained by the defendants against a third person. He, however, granted the relief prayed for, as he was of opinion, that the bailiff had improperly given possession to the defendants without making “ any inquiry of the village *kamdar* as to the true facts of the case.” But that was not a question with which the Mamlatdar was concerned. It is clear that, in the present case, the bailiff should have proceeded for the alleged obstruction of his possession by the defendants not by a suit under the Mamlatdars' Act, but by an application under section 332 of the Civil Procedure Code or by a regular suit, as advised. The Mamlatdar acted illegally in making a decree in the plaintiff's favour in opposition to the distinct direction contained in section 15 of the Act. We, therefore, reverse the decree made by him, and reject the plaintiff's claim, with costs throughout.” —

GULABBHAI GOPALJI v. JINABHAI RATANJI, I. L. R. 13 Bom. 213 ;
S. C. Prin. Jndg. for 1888, p. 133.

[*Mamlatdar's decision for possession—Dispossession of third person in execution—Suit by the third person before the Mamlatdar—Res judicata—Resolution of Government.*] The opponents had obtained a decree for the possession of certain land against the brother and father of the applicants in the Court of the Mamlatdar at Karad in the Satara District. The applicants were not parties to the suit. The decree was executed and the opponents were put into possession. Thereupon the applicants on the 19th May, 1884, presented a petition in the Mamlatdar's Court under s. 4 of Bombay Act III of 1876, alleging that they had been in actual possession of the lands, and had been ousted in execution of the decree, and praying that possession thereof might be restored to them. The Mamlatdar was of opinion that the matter was *res judicata*, and dismissed the petition. He relied on a circular of the Executive Government as his authority. The applicants then applied to the High Court under its extraordinary jurisdiction. The following is the judgment of the High Court:—

"WEST, J.—In the present case the Mamlatdar rejected the application of the present applicants, and referred for authority to a certain circular of the Executive Government. This was irregular, as in the exercise of his judicial functions he was bound to be governed by the law as he understood it, or as it had been expounded by superior judicial authority, not as it was understood or expounded by unjudicial persons. But the present is a case in which the extraordinary jurisdiction of this Court is invoked, and we must guard against its being abused, merely because the Mamlatdar has fallen into a formal error. Under section 332 of the Code of Civil Procedure a Subordinate Judge, on the application of the present petitioners, would have examined them to discover if there was a probable cause for their application, and, in the absence of reason to suppose they had been wronged, he would have refused them a summary investigation. A similar inquiry by the Mamlatdar would, it seems to us, have led, in all probability, to a similar result (a). The applicants would thus have been left to their remedy by a suit on their title, if they have a title. That remedy is still

(a) But there is no similar provision in the Mamlatdar's Act to make similar inquiry.—Ed.

open to them ; and, seeing the relations of the parties, we do not think the case is one in which the extraordinary jurisdiction ought to be used to upset the order of the Mamlatdar, merely on account of an irregularity not apparently involving an injustice to the applicants. We, therefore, discharge the rule with costs."—*NANA BAVAJI v. PANDURANG VASUDEV*, I. L. R. 9 Bom. 97 ; S. C. Prin. Judg. for 1884, p. 234.

[*Mamlatdar's decision under s. 15, cl. (c)—Dispossession of a third person in execution—Suit by the third person before the Mamlatdar—Res judicata—Resolution of Government.*] The opponent, claiming to be entitled to unobstructed possession of the land in dispute, had obtained a decree to that effect in a suit in the Mamlatdar's Court at Karad, in the Satara District. The applicant was not a party to that suit. In execution of that decree the applicant was put out of possession of the land. The applicant thereupon brought the present suit against the opponent, alleging that he had been in possession of the land under a registered deed of mortgage executed to him by N. the Mamlatdar, relying on G. R. No. 1673 of 11th March 1882, rejected the applicant's suit as *res judicata* by the former suit in respect of the same land. The applicant applied to the High Court under its extraordinary jurisdiction.

" BIRDWOOD, J.—The decree made by the Mamlatdar in the former suit, under clause (c) of section 15 of the Mamlatdars' Courts Act (No. III of 1876) was clearly no bar to the exercise by him of jurisdiction in the present suit, inasmuch as the present plaintiff was not a party to the former proceedings. It was irregular for the Mamlatdar to refer to a Resolution of Government for the purpose of determining the effect to be given to his former decree. A similar irregularity was noticed by this Court in *NANA BAVAJI v. PANDURANG VASUDEO* (I. L. R. 9 Bom. 97). In that case, the circumstances of which were, to some extent, similar to those of the present case, this Court refused to exercise its extraordinary jurisdiction on behalf of the plaintiff as having regard to the close relationship existing between the defendants in the first suit and the plaintiff in the second, the Court was of opinion that in all probability, an inquiry into the merits of the second suit would not really result in a decision in the plaintiff's favour. But no such relationship exists between the defendants in the former proceedings, in which the

present defendant was the plaintiff, and the plaintiff in the present case ; and, on such material as there is before us, it is impossible for us to form any opinion as to the probable success of the present suit, if it were now inquired into its merits. We reverse the order of the Mamlatdar, and direct that the case be heard."—GOVINDA BABAJI v. NAIKU JOTI, I. L. R. 10 Bom. 78 ; S. C. Prin. Judg. for 1885, p. 154.

[*Possessory suit—Execution of decision against a third party—Mamlatdars Courts Act III of 1876, s. 15, cl. (a) sub-clause (1)—Legislation—Discretionary power of High Court.*] The facts of the case appear from the following judgment :—

" SARGENT, O. J. :—In this case the Mamlatdar passed a decree in favour of the opponent directing possession to be given to him by one Gulab. The patil kulkarni having reported that in proceeding to execute the decree he found that the applicant Natheca had been occupying the place on behalf of the defendant Gulab, the Mamlatdar ordered that if the applicant " did not vacate the place and made over place by persuasion, he should be forced to vacate the same." The applicant complains of this order as being beyond the jurisdiction of the Mamlatdar.

The Division Court in KASAM SAHEB v. MARUTI (I. L. R. 13 Bom. 552) remarks that " The Mamlatdars' Act does not seem to contemplate the case of a third party being ousted in the execution of an order for possession, for such order is only made on finding that defendant himself is in possession." We agree in this view of the Act. It is to be remarked that the language in cl. (a), (sub-clause 1) of section 15 of the Act with respect to the " plaintiff's possession" differs materially from that used in sub-clause (2) with regard to " defendant's possession," which standing alone, without any additional words to enlarge its meaning, must be understood as " actual possession." Moreover section 18 shows that the only person who is contemplated as being affected by the Mamlatdar's giving possession to the plaintiff is the person against whom the decree is passed. This view of the Act may lead to a practical difficulty in the working of it which it would be perhaps advisable to remove by Legislation, but which is quite beyond the power of a Government Resolution to remedy, as was apparently attempted to be done by Resolution No. 1673 of 11th March, 1882. We think,

therefore, that the Mamlatdar's order was, strictly speaking, beyond his authority, as the exercise of our extraordinary jurisdiction is one of discretion, and as the applicant's petition contains no distinct denial that he was occupying merely on behalf of Gulab, we must refuse to interfere in the matter. The applicant is not without his remedy by suit. See *KASAM SAHEB v. MARUTI* (I. L. R. 13 Bom. 552).—*NATHEKHA VALAD BHEKHANKHA v. ABDUL ALI*, I. L. R. 18 Bom. 449; S. C. Prin. Judg. for 1893, p. 308. See also *ANTU BIN KUSHA v. VISHNU GOVIND BOWA JOSHI MATANGE*, Prin. Judg. for 1896, p. 488.

[*Execution of Mamlatdar's decision—Dispossession of a third person—Jurisdiction—S. 622, Civil Procedure Code (Act XIV of 1882)—Remedy of person if dispossessed.*] G got a decree for possession against P in a Mamlatdar's Court. In execution the Mamlatdar directed the ouster of C, who was in possession and who was not a party to the decree. Held, that the Mamlatdar's order for the execution of the decree by the ouster of C was without jurisdiction and that it should be set aside under section 622 of the Civil Procedure Code (Act XIV of 1882). If, however, the third person C has actually been dispossessed under that order, his remedy to recover possession is, as pointed out in *KASAM SAHEB v. MARUTI* (I. L. R. 13 Bom. 552), by suit either before the Mamlatdar or in a Civil Court.—*CHINAYA v. GANGAVA*, I. L. R. 21 Bom. 775; S. C. Prin. Judg. for 1896, p. 194.

[*Execution of decision—Ouster of person not bound by decision.*] Where a Mamlatdar's Court directed the decree in a possessory suit to be executed by the ouster of the applicants who were not bound by the decree, the High Court following *NATHEKHA v. ABDUL ALI* (I. L. R. 18 Bom. 449), reversed the order as being without jurisdiction, leaving the applicants if dispossessed under it to their legal remedies pointed out in *CHINAYA v. GANGAVA* (Prin. Judg. for 1896, p. 194).—*ANTU BIN KUSHA v. VISHNU GOVIND*, Prin. Judg. for 1896 p. 488.

[*Execution of Mamlatdar's decision—Third person ousted in execution—Suit for possession in Mamlatdar's Court by person ousted—Jurisdiction.*] A person ousted in execution of a decree of the Mamlatdar's Court, to which he was no party, can himself bring a suit for possession in the Mamlatdar's Court against the person by

whom he was ousted, and the defendant in such a suit cannot rely on the fact of his having obtained possession in execution of a decree against other parties as a bar to the jurisdiction of the Mamlatdar. This course of procedure has been so long sanctioned that it would not be right to depart from it notwithstanding the decisions in the cases of RAMCHANDRA SUBRAO v. RAVJI, I. L. R. 20 Bom. 351 and MANIKCHAND v. DAJI, Prin. Judg. for 1896, p. 665.—NINGAPPA v. ADEVEPPE, I. L. R. 24 Bom. 397 ; S. O. 2 Bom. L. R. 136.

(D) " THERE IS A CROP ON SUCH LAND."

There were frequent cases in which the exercise of the summary powers under the former Act had been known to cause great hardship to agricultural tenants, who were evicted either at or before harvest time, without any compensation for the crops they may have raised on the land. The hardship is especially great in cases where the tenant, often ignorant and in debt to the landlord, had been under a belief or expectation that his tenancy would be renewed and had, in consequence of such impression, sown crops on the land. Such an impression might be mistaken and incapable of any legal justification, but the hardship was none the less real. The former Act did not provide the Mamlatdar in such cases with any express power to deal equitably with growing or standing crops, so as to defer delivery of possession either until compensation had been paid to the tenant or until the crop had been removed by him. This equitable power is, therefore, given to him by the proviso to s. 20, cl. (1) of this Act. This proviso has been adapted, with some necessary modifications, from the provisions of rule 87, at pages 33 and 34 of the Bombay High Court Civil Circulars, regarding the practice generally followed in civil cases when there is a crop on the land of which possession has been awarded (a).

(E) " SOWN IN GOOD FAITH."

A person in possession of the land is entitled to the benefit of this proviso if he has sown the field in good faith.

(a) See Statement of Objects and Reasons in the Bombay Government Gazette, dated 4th September 1905, Part VII, page 521.

But if he had any fraudulent motive at the time of sowing his field, then that is a wrong ; and the maxim of law is *Nullus commodum capere potest de injuria sua propria*, i. e., no man can take advantage of his own wrong (a). In the former case if the defendant makes an application to stay delivery of possession, making proper arrangements for the payment of costs to the plaintiff, the Mamlatdar is *bound* to stay delivery of possession ; but if no such application is made nor any such arrangement is made for the payment of costs, the Mamlatdar in the exercise of his discretion *may* stay delivery of possession. In either case if the plaintiff agree to pay due compensation for the crop and for the Government assessment paid by the defendant for the current year, possession must be given to the plaintiff.

(F) "AS AN ARREAR OF LAND REVENUE."

As to the provisions of law for the recovery of land revenue, see the Bombay Land Revenue Code, 1879, s. 150 *et seq.*

(G) "IN THE FORM OF SCHEDULE C."

As to the form of schedule C see at the end of the Act.

(H) "WHERE THE MAMLATDAR AWARDS COSTS."

It is not left to the discretion of the Mamlatdar to award costs. The law awards costs ; for it is enacted in sub-s. 4 of section 19 that "the costs of the suit, including the costs of execution, *shall* follow the decision."

(I) "SUCH COSTS."

These words evidently refer to the costs awarded by the Mamlatdar. Costs may be divided as follows :—

I. Costs awarded by the law itself, *e. g.*, costs awarded by sub-s. 4 of s. 19 ; s. 16, proviso 2 ; Bom. H. C. Civ. Cir. Or. (1903), para 69, p. 26, which awards a fee of Rs. 5 to a pleader.

II. Costs awarded by Court, viz. :—

(1) Mamlatdar, *e. g.*, Bom. H. C. Civ. Cir. Or.

(a) Broom's Legal Maxims, 7th Ed., p. 227.

(1903), para 69, p. 26, which authorizes a Mamlatdar to award more than Rs. 5.

(2) The High Court.

III. Costs for *awarding* which there is no provision in the Act, viz. :—

(1) By Mamlatdar; *e. g.*, when the suit abates under cl. ii, sub-section 3 of section 18.

(2) By Collector; *e. g.*, s. 6 and sub-section 2 of s. 23.

(3) By the High Court.

IV. Costs for the *recovery* of which there is no express provision in the Act, viz. :—

(1) Those incurred in the Collector's Court.

(2) Those incurred in the High Court.

Remark.—For the recovery of costs in the High Court see **NEMAVA v. DEVENDRAPPAA**, I. L. R. 15 Bom. 177; S. O. Prin. Judg. for 1890, p. 133.

(J) "TOGETHER WITH THE COSTS OF EXECUTION."

What are the costs of execution? Sub-s. 1 of this section says that the Mamlatdar will issue orders to the village officer, &c. No written application or process for execution or Court-fee or process-fee appears to be necessary.

[*Mamlatdar's order granting an injunction not to disturb possession—Reversal of this order by High Court—Restoration of property taken in execution—Execution of order of High Court regarding costs—Power of Mamlatdar.*] In a suit filed by one Devandrappa Patel in the Mamlatdar's Court, an injunction was granted against Nemava, restraining her from disturbing Devandrappa in his possession of certain lands. Upon Nemava's application the High Court set aside this order with costs (I. L. R. 16 Bom. 177). Thereupon Nemava applied to the Mamlatdar praying that the lands should be restored to her possession and that the costs awarded by the High Court should be recovered from the opponent Devandrappa. The Mamlatdar rejected this application, and further

held that he had no power under the Bombay Act III of 1876 to execute the High Court's order for costs.

Against this decision Nemava applied to the High Court under its extraordinary jurisdiction under section 622 of the Code of Civil Procedure (Act XIV of 1882).

" BIRDWOOD, J.—The applicant asks us to set aside an order by the Mamlatdar refusing to restore to her certain land and value of crops thereon, which had been taken by the opponent in execution of a decision in his favour in the Mamlatdar's Court which was reversed by this Court. The case referred to is that of NEMAVA v. DEVANDRAPPY, (I. L. R. 15 Bom. 177.)

" It is necessary for us to determine whether a reversal by this Court of a Mamlatdar's decision for awarding possession carries with it a right to the restoration of any property taken in execution of the decision, as the Mamlatdar in this case granted an injunction only, ordering the present applicant not to disturb the opponent's possession, and that order only was reversed by this Court. No order by the Mamlatdar under the first part of section 17 of Bombay Act III of 1876 has been produced, or could legally have been made. This Court set aside the injunction granted by the Mamlatdar because the opponent claimed to be in possession of the land through his tenants who had attorned to the present applicant, and in such a case no injunction could legally be granted. If the opponent, under colour of the injunction obtained by him, ejected his tenants, or if the Mamlatdar ordered them to give up possession to him, it does not appear how his order could be regarded as one made under the Act with which we could interfere. It is clear that the present applicant has had no physical possession of the land in dispute of which she has been or could have been deprived by the Mamlatdar. The order now applied for by her cannot, therefore, be made.

" As regards the Mamlatdar's refusal to levy the costs ordered by this Court in the case referred to, on the ground that he had no jurisdiction to do so under section 17 of Bombay Act III of 1876, we are of opinion that he has the same power as regards costs decreed by this Court as he has as regards costs decreed in his own Court. The litigation in this Court was a continuation of the suit in the Mamlatdar's Court, and any costs incurred are subject to the rules laid down in the Act. We reverse so much of the Mamlatdar's

order as refuses to levy the applicant's costs in the litigation in question and reject the other prayer contained in the present application. Each party to bear her and his own costs of this application.—*NEMAVA v. DEVANDRAPPAA*, I. L. R. 16 Bom. 238; S. C. Prin. Judg. for 1891, p. 105.

(K) "ANY PERSON DISOBEYING."

In the case of *REG. v. KRISHNASHET*, 5 Bom. H. C. R. Cr. Ca. 46, when Bombay Act V of 1864 was in force, it was held that disobedience to a Mamlatdar's order regarding a right of way was punishable under s. 188 of the Indian Penal Code (Act XLV of 1860). But the High Court since held (*QUEEN EMPRESS v. ULWAPGAVDA*, Crim. Rul. No. 27 of 1896 decided on 2nd July 1896) that that section referred to orders made for public purposes and did not apply to an order made in a possessory suit between party and party. The result was that orders of the Mamlatdar could be disobeyed with impunity. Clause 4 is inserted to restore the original intention (Cf. Proceedings of the Legislative Council, Vol. XV, p. 25).

(L) "PUNISHABLE UNDER S. 188."

The offence being punishable under s. 188 of the Indian Penal Code, a sanction is necessary under s. 195 of the Code of Criminal Procedure, 1898.

The prosecution must prove—

1. That an *injunction* was granted.
2. That it was *served* upon the defendants.
3. That he has *disobeyed* it.

If these three points are proved, the defendant is to be punished under the second or the third para. of s. 188 of the Indian Penal Code according to circumstances.

[*Bombay Act V of 1864—Jurisdiction—Disobeying order of public servant.*] Where the Mamlatdar's order was, 'that the plaintiff having possession of the premises, the defendants should not allow the water from his house to fall within the plaintiff's premises,' and, as the Mamlatdar states, the order was made under Bom. Act V of 1864, which gives him authority to decide regarding possession of premises, but not to order a person 'to abstain from a

certain act, or to take certain order with certain property in his possession or under his management,' as mentioned in s. 188 of the Penal Code, the High Court reversed the convictions and sentences, as the Mamlatdar was not legally empowered, under Bombay Act V of 1864, to pass the order which the accused were charged with disobeying.—REG. v. BHU BIN VITHU, 3 B. H. C. R. Cr. 53.

[*Bombay Act V of 1864—Order to keep a gateway open—Disobedience of order.*] One Bapu Sakharam having complained to the Mamlatdar of the City of Poona that the accused was preventing his right of way through his (the accused's) own compound gateway, the Mamlatdar made an inquiry under Act V of 1864 (Bombay), and, finding the complainant's right of way proved, ordered the accused not to obstruct the complainant in going and coming by his gateway, and to keep it open. The accused disobeyed this order by keeping the gate still locked. E. T. Richardson Esq., Magistrate F. P. at Poona, thereupon convicted the accused under s. 188 of the Penal Code and passed a punishment on him. The case was referred to the High Court under s. 434, Or. Pro. Code (Act XXV of 1861) by Hon'ble Mr. Justice Lloyd who was then Session Judge of Poona with a remark that under the Bombay Act V of 1864 the Mamlatdar had no authority to promulgate the order, and that disobedience to that order was not an offence under s. 188 of the Penal Code. The High Court reversed the conviction and the sentence.—REG. v. KHANDOJI BIN TANAJI, 5 B. H. C. R. Cr. Ca. 21.

Editor's note.—But under the present Act, however, a Mamlatdar can grant a relief in the case of disturbance of "the use of roads or customary ways to fields."

[*Bombay Act V of 1864—Order directing to keep open a right of way to a privy—Disobedience of order.*] An order passed by a Mamlatdar under Act V of 1864 (Bombay) directing the accused to keep open a right of way to a privy, being in reality an injunction to refrain from disturbing the possession of the parties, was, therefore, within the jurisdiction of the Mamlatdar; and a disobedience of such order is an offence under s. 188 of the Penal Code.—REG. v. KRISHNASHET BIN NARAYANSHET, 5 B. H. C. R. Cr. Ca. 46.

[*Penal Code (Act XLV of 1860) ss. 99 and 186—Voluntarily obstructing a public servant in discharge of his duties—*

Mamlatdar's decision—Execution by a Surveyor under Collector's orders—Public functions—Right of private defence.] A Mamlatdar, in execution of a decree passed by him under Bombay Act III of 1876, finding that there was no land corresponding to the boundaries specified in the plaint, and the parties were joint owners and in joint occupation of the land in dispute, asked for advice and instructions from the Collector, who sent for the papers in the case and issued an order to the Surveyor to execute the decree in a particular way, by dividing the land. The Surveyor, attempting to execute the decree, was obstructed by the accused, who was thereupon convicted of the offence of voluntarily obstructing a public servant in the discharge of his duties under section 186, Indian Penal Code. It was held that as the Collector had no legal authority to issue the order to the Surveyor, in execution of the Mamlatdar's decree, the Surveyor, acting under that order, was not discharging a public function, and the act of the accused was not an offence against section 186, Indian Penal Code. It was further held that the Collector's order was so entirely *ultra vires* as to leave no room for the operation of either the first or the second paragraph of section 99 of the Indian Penal Code.—*In re TULSIRAM ARJUNA PADLE*, I. L. R. 13 Bom. 168.

[*Possessory Suit—Bombay Act III of 1876—Disobedience of the injunction—Power of the Mamlatdar to punish for contempt of Court—Application to High Court under extraordinary jurisdiction.*] Plaintiff obtained an injunction against the defendant under the Mamlatdars' Courts Act (Bom. Act III of 1876) restraining the defendant from obstructing him in the exercise and enjoyment of his right of way to his field through a piece of land belonging to the defendant. He applied to the Mamlatdar complaining that the defendant obstructed him in the enjoyment of his right and asking the Mamlatdar to enforce the order or to grant sanction under s. 188 of the Indian Penal Code to prosecute the defendant or, to punish him for contempt of Court. The Mamlatdar dismissed the application, saying: "Under the ruling of QUEEN EMPRESS v. ULWAPGAVDA, Cr. R. 27 of 1896, this Court cannot order prosecution under s. 188 of the Indian Penal Code. Also the Court cannot take of its own motion any steps in the matter."

The plaintiff applied to the High Court under its extraordinary jurisdiction, contending *inter alia* that the Mamlatdar

ought to have either granted sanction under s. 188 of the Indian Penal Code for disobedience of his order or punished the defendant for contempt of Court.

Held, that as for sanction for a prosecution under s. 188 of the Indian Penal Code, the applicant ought to have applied to the District Court under the Criminal Procedure Code (Act V of 1898) s.195, cl. 7 (c).

Held, also, that a Mamlatdar has no power to commit a person to prison for contempt of Court for disobeying an injunction.—RAVJI KHANDU v. S. B. FRASER, 8 Bom. L. R. 638.

22. Subject to the provisions of section 23, sub-
Possession to be given without prejudice to rights of parties. section (2) and section 24, the party to whom the Mamlatdar gives possession, or restores a use, or in whose favour an injunction is granted, shall continue in possession or use until ousted by a decree or order of a competent Civil Court (A) :

provided, *firstly*, that nothing in this section shall prevent the party against whom the Mamlatdar's decision is passed from recovering by a suit in a competent Civil Court mesne profits (B) for the time he has been kept out of possession of any property, or out of enjoyment of any use :

provided, *secondly*, that in any subsequent suit or other proceeding in any Civil Court between the same parties, or other persons claiming under them, the Mamlatdar's decision respecting the possession of any property or the enjoyment of any use or respecting the title to or valuation of any crop dealt with under the proviso to sub-section (1) of section 21, shall not be held to be conclusive (C).

(A) " UNTIL OUSTED BY A DECREE
OR ORDER OF A COMPETENT CIVIL
COURT."

The object of this Act is to discourage parties from taking the law in their own hands, and from asserting their rights by force. The result of a suit under this Act is to restore to possession the party ousted by force, and to leave the question of title wholly untouched and open to the litigation in a regular suit. It has, therefore, been held that when a regular suit to establish title and recover the land is brought against the party so restored to possession, the whole burden of proof is upon the plaintiff in such regular suit; and, until he can show a title to the property, the Court will not look into the defendant's title or disturb his possession (a). If he prove twelve years undisturbed possession antecedent to the ejectment under the summary order made under this section, this will be good title, sufficient at least to throw upon the defendant the burden of proving a better one (b).

When a person ousted otherwise than by due course of law does not avail himself within six months of the summary remedy provided by this Act or the Specific Relief Act (I of 1877), s. 9, and afterwards brings a regular suit to recover possession, the question is whether the *onus* of proof lies upon him or upon the defendant. These two Acts provide a special and a summary remedy, and one may say that it was not intended to interfere with the rule *Nullus commodum capere potest de injuria sua propria* (c), i. e., no man should take advantage of his own wrong to shift the *onus* upon his adversary. On this point the rulings of the Calcutta, Madras and Bombay High Courts do not agree. But it has been ruled by the Bombay High Court that when there is a conflict between its decision and that of any other High Court, then in this Presi-

(a) MAINUDIN v. GRISH CHANDRA, 7 W. R. Civ. Rul. 230.

(b) RAM CHANDRA CHOUDHRI v. BRAJANATH SARMA, 3 Beng. L. R. App. 109; BALLABI KANT BHATTACHARJYA v. DURYODHAN SIKDAR, 7 W. R. Civ. Rul. 89.

(c) Broom's Legal Maxims, 7th Ed., p. 227.

dency preference should be given to the former (a). In *DADABHAI NARSIDAS v. THE SUB-COLLECTOR OF BROACH* (b), it was said that the law of India requires that in an action for ejectment the ordinary rule that a plaintiff should always recover by the strength of his own legal title should always be enforced. The reason for this is that the law of this country gives to a person who is dispossessed of property a remedy which the law of England does not provide; and that if he does not choose to avail himself of this remedy, he has no claim to the advantages which it would have secured to him. This was followed in *LAKSHMIBAI v. VITHAL RAMCHANDRA* (c). Subsequently, however, in a Full Bench Judgment delivered by Westropp C. J. in *PEMRAJ BHAVANIRAM v. NARAYAN SHIVARAM KHISTI* (d), it was laid down that possession is a good title against all persons but the rightful owner, and entitles the possessor to maintain ejectment against any other person than such owner who dispossesses him. This was followed in *KRISHNARAO YASHWANT v. VASUDEV APAJI GHOTIKAR* (e), in which *DADABHAI NARSIDAS v. THE SUB-COLLECTOR OF BROACH* was dissented from, and it was said that the passage in the Privy Council Judgment in *WISE v. AMIRUNNISSA KHATUN* had not the effect attributed to it by the Calcutta High Court. In *HANMANTRAV v. SECRETARY OF STATE FOR INDIA* (f) where the party suing was in possession, it was held by RANADE, J. that though a party may rely upon his previous possession, it must be of such a character as leads to a presumption of title. Mere previous possession less than the Limitation Law requires is insufficient except in a possessory suit, and mere wrongful possession is insufficient to shift the burden of proof. The position here adopted is not clear. The case was not one of

(a) *ANANDAPA v. HANMANT GAWDA*, Irin. Judg. for 1884, p. 67.

(b) 7 Bom. H. C. Rep. 82.

(c) 9 Bom. H. C. Rep. 53.

(d) I. L. R. 6 Bombay 215.

(e) I. L. R. 8 Bom. 371. See also Field's *Law of Evidence* 5th Ed., 1894, p. 507.

(f) I. L. R. 25 Bom. 287 at 290 and 303.

dispossession. The plaintiff was in possession and sought confirmation thereof. Jenkins, C. J. (with whose judgment Ranade, J., appeared to desire to concur) had held that section 110 of the Evidence Act obviously does not require possession according to title, otherwise it is meaningless. It was therefore sufficient for the plaintiff to show possession to recover against the defendant unless the latter could show title. The question was whether he had shown it. If, however, the plaintiff had been forcibly dispossessed more than six months before suit, the question then would have arisen whether proof of previous possession was sufficient.

[*Possession under Mamlatdar's order—Party to continue in possession until ejected by Civil Court.*] This section gives to Mamlatdar's Courts jurisdiction in case of dispossession within six months from the date of such dispossession and relates to immediate possession ; and under section 18 of Bombay Act III of 1876 the party to whom such immediate possession is given by the Mamlatdar, or whose possession he shall maintain, shall continue in possession until ejected by a decree of a Civil Court.—**BASAPA v. LAKSHMAPA**, I. L. R. 1 Bom. 624.

[*Suit to set aside Mamlatdar's order.*] Though an order passed by a Mamlatdar under Bombay Act III of 1876 may be superseded by a decree of a Civil Court, a suit to set aside the order will not lie not being contemplated by s. 18 of the Act.—**TULJARAM RAJARAM v. BAMANJI KHARSEDJI**, I. L. R. 19 Bom. 830 ; S. C. Prin. Judg. for 1894, p. 354.

Limitation.

As under s. 6 of Act IX of 1871, which was in force when the Mamlatdars' Act was passed, a period of limitation differing from that prescribed by that Act could be specially prescribed for any suit, the Bombay Legislature enacted the provision contained in s. 21 of the Bombay Act III of 1876.

In Act IX of 1871, Schedule II, Art. 46, there were the words “*respecting the possession of property*” and “*to recover the property comprised in such order* ;” but these words were omitted in section 21 of the Bombay Act III of 1876 to make it applicable to the enjoyment of uses, &c.

In 1877, however, the provisions contained in Art. 46 Schedule II of Act IX of 1871 were re-enacted in Art. 47 Schedule II of Act XV of 1877. These provisions were not co-extensive with the provisions contained in s. 21 of the Bombay Act III of 1876. Yet they were not repugnant to one another, and consequently they might both stand together.

In framing the present Act as the Legislature found that section 21 in the Bombay Act III of 1876 was redundant, they have not re-enacted it in the present Act.

Article 47, Schedule II of Act XV of 1877 runs thus—

"Art. 47. By any person bound by an order (a) respecting the possession of property made under the Code of Criminal Procedure, Chapter XL or the Bombay Mamlatdars' Courts Act, or by any one claiming under such person, to recover the property comprised in such order ; three years from the date of the final order (c) in the case."

(a) "By any Person bound by any order."

[*Person not made a party—Jurisdiction—Limitation.*] A brought a suit in a Mamlatdar's Court, under Bombay Act V of 1864, to recover possession of certain land from B. C joined in the proceeding *propter motu*, and the Mamlatdar, on the 1st May 1865, made an order awarding possession of the land to C. In an action brought by A against C in the Civil Court on the 18th October 1869, C pleaded limitation under section 1, cl. 7, Act XIV of 1859, as the action was not filed within three years of the Mamlatdar's order. *Held* that the action was not barred by limitation, as C was not properly a defendant in the Mamlatdar's Court, and that, therefore, the Mamlatdar had no power to make an order regarding him.—**VISHVANATH RAV KACHESHWAR v. NARAYEN BIN GOPAL KHAPE**, 9 B. H. C. R. 424.

[*Mortgagor in possession—Right of mortgagee to be put in possession—Limitation.*] K brought a suit against G to recover possession of certain land alleging that the property was mortgaged to him by B, and that he (K) was forcibly dispossessed by the defendant on the 1st August 1865. The defendant pleaded, *inter alia*, that the suit was barred, not having been brought within three years from the date of the Mamlatdar's order, made on the 20th of

November 1865 under Bombay Act V of 1864 on the application of the said B, and that as the Mamlatdar's order awarded possession to the defendants, it bound the mortgagor B and the mortgagee the plaintiff. *Held* that if the mortgagor had been in possession within 12 years and the mortgagor gave the mortgagee the right to be put into possession, the mortgagee would be entitled to bring his action based upon the title of his mortgagor; nor would he be affected by the circumstance of the mortgagor having subsequently made a fruitless attempt to recover possession on dispossessing by the defendant, in the Mamlatdar's Court, and neglected to bring his suit within three years. As the mortgagor was in possession within 12 years, the action was not barred.—**KRISHNAJI NARAYEN v. GOVIND BHASKAR**, 9 B. H. C. R. 275.

[*Tenancy—Injunction—Subsequent trespass—Limitation.*] The defendant had brought his suit in the Mamlatdar's Court merely as a tenant whose possession had been disturbed within the period of his tenancy, and it was a tenant entitled to present possession that he had obtained an injunction against C. Subsequently the plaintiff who derived his title from C, brought a suit against the defendant alleging a specific trespass in 1882 and did not allege any tenancy or sue to recover possession on the ground of its termination. The Lower Appellate Court rejected the claim on the ground that no suit had been brought by C within three years from the date of the Mamlatdar's order. The High Court held that this omission of C to sue did not bar the plaintiff's suit, and that the case ought to have been dealt with only as one alleging a specific trespass in 1882.—**MAHADEO VASUDEO v. BAPU BIN MAHADJI**, Prin. Judg. for 1888, p. 6.

[*Order without jurisdiction—Person bound by order.*] A person is not bound by an order within the meaning of Art. 47 of Schedule II of Act XV of 1877, when that order was passed by a Mamlatdar without jurisdiction under Bombay Act III of 1876. See **SHIDLINGAPA v. KARIBASAPA**, I. L. R. 11 Bom. 599. The plaintiff's suit to redeem is, therefore, not time-barred.—**HASANBHAI VALAD DHONDBHAI v. LAKSHMAN VALAD RADHUJI**, Prin. Judg. for 1889, p. 55.

[*Obstruction to possession—Suit for injunction—Rejection of claim by Mamlatdar—Art. 47, Sch. II, Act XV of 1877—Limita-*

tion.] The plaintiff sued for an injunction to restrain defendant from obstructing plaintiff's possession. The Mamlatdar found that plaintiff was not in possession and rejected the claim. The plaintiff brought a regular suit and in second appeal the High Court passed the following :—

JUDGMENT.—The case turns on the meaning of s. 21 of the present Mamlatdar's Act read with s. 47, Limitation Act. Section 21 of the former Act read alone would cover this case, but is it also covered by section 47 of the Limitation Act? Is the order in question "an order respecting the possession of property?" The point to be decided by the Mamlatdar was whether the plaintiff was entitled to an injunction to restrain the defendant from obstructing the plaintiff's possession. Under s. 15 of the Act, the Mamlatdar is bound on such a claim to raise an issue "whether the plaintiff was in possession," and to give a finding on that point. That issue being found in the negative, the Mamlatdar made an order rejecting the claim. The effect of this order was to confirm the defendant in possession, and as possession was also the basis of the plaintiff's claim, we hold on the authority of *RANGO v. RIKHIVADAS* (11 Bom. H. C. R. p. 174) and *CHINTO v. VISHNU* (Prin. Judg. for 1883, p. 131) that the order was one respecting possession and proper.—*ANNAJI VITHAL v. DAJI BIN GANPATRAY*, Prin. Judg. for 1889, p. 161.

[*Suit by tenant against third person—Subsequent suit by landlord—Limitation.*] In 1884, S, who alleged that he was the tenant of M, obtained an order of the Mamlatdar in his favour against K with respect to a piece of land, and K did not institute a suit against S within three years. In 1888 plaintiff sued to recover possession of the land from M on the ground that M was in possession as tenant of his vendor K and as owner of the land. Both the Lower Courts found that, as the suit if brought by K would have been barred under s. 18 of the Mamlatdar's Act (Bombay Act V of 1864), it was barred when brought by K's assignee, the plaintiff. Held that as M did not derive his possession from S, K's right to sue him would not have been barred and the present suit was not barred.—*NYALCHAND GANGARAM v. KHANDU SAKHARAM*, Prin. Judg. for 1891, p. 338.

["Person not bound by order"—Limitation.] The land in dispute was situate at Ganje, in the Javali Taluka, in the District of Satara, and originally belonged to Chikne family. By a deed

dated 4th July 1870 Ramji bin Haibati Chikne mortgaged the land to one Baji Moreshwar. In 1876 Bapu bin Mahadaji, the present defendant, brought a possessory suit in the Mamlatdar's Court for an injunction against Ramji Chikne and others to restrain them from interfering with his possession and enjoyment of the land. On the 9th of October 1876 the Mamlatdar granted the injunction prayed for holding that though the land belonged to defendants, the possession thereof was with plaintiff. On the 13th of July 1877 Baji Moreshwar obtained a decree on his mortgage, and in execution thereof acknowledged that he had received possession of the land in suit from Ramji Chikne. In 1883 the present plaintiff, alleging that he was the assignee of Baji Moreshwar's right as mortgagee and of Ramji bin Haibati Chikne's equity of redemption, brought a suit to eject the present defendant on a special act of trespass. The suit was dismissed, the Court being of opinion that the Chiknes had lost their right to the land in suit by their omission to sue for possession within three years from the date of the Mamlatdar's order of 1876, and that the sale to plaintiff of the equity of redemption having been made after their right to it had become extinguished conferred no right on plaintiff. In appeal the High Court confirmed the decree of the Court of first instance and left it to plaintiff, if so advised, to seek his remedy against defendant as being formerly Chikne's and subsequently his tenants. In the year 1888 plaintiff brought this suit as assignee of the rights of Baji Moreshwar, the mortgagee, and of the equity of redemption of Ramji Chikne to recover possession of the land from defendants, alleging that defendant held it as tenant of the Chikne family from year to year and that he had wrongfully obstructed his (plaintiff's) tenant from cultivating it. Defendant replied, *inter alia*, that the suit was barred by limitation. The Subordinate Judge of Medha found that the suit was not time-barred. In appeal Rao Bahadur Jayasatya Bodhrao Tirmalrao, First Class Subordinate Judge A. P., at Satara, confirmed the decree of the Court of first instance. On second appeal the High Court decided as follows :—The plaintiff cannot stand in a better position than the Chikne family. The Mamlatdar's judgment shows that the defendant, whilst admitting that the land in question had been let by the plaintiff's father to his father, claimed by long possession, whatever the exact nature of his title may be, to have acquired at any rate a right of permanent possession of which the

Chikne family could not deprive him ; and the effect of the Mamlatdar's order was to maintain the defendant in possession (directing the Chikne family not to obstruct his possession) within the meaning of section 15 of the Mamlatdar's Act V of 1864, and so to continue him in possession until ejected by a decree of the Civil Court. Such was the effect of that section having regard to the several sections of the Act, although it is made clearer by the language of section 18 of the Act of 1876. It was, therefore, incumbent on the Chikne family, who claim to treat him as a tenant, will, to bring a civil suit within three years as provided by clause 46 of the Limitation Act of 1871, and that not having been done, the plaintiff, who derives his title as owner from that family, cannot now recover possession from the defendant, whatever may be the precise nature of defendant's title to the possession. The defendant must also succeed under the Act of Limitation. Ever since the proceedings in the Mamlatdar's Court commencing with the defendant's suit in May 1876, the possession of the defendant, whatever may have been its nature originally, is shown, from what has been above stated, to have been distinctly adverse to the present claim as against the Chikne family and also the mortgagee who might have taken possession at any time under the mortgage. As the present suit to obtain possession was not instituted till September 1888, it is barred by the Statute. On both these grounds the decree of the Lower Court was reversed and the plaintiff's claim was dismissed.—

BAPU BIN MAHADAJI V. MAHADAJI VASUDEV, I. L. R. 18 Bom. 348 ; S. C. Prin. Judg. for 1893, p. 208.

[*Mamlatdar's decision not binding on those not parties to it* — *Suit—Law of Limitation.*] Plaintiffs, two brothers and one sister, being Mahomedans, sued the defendant who claimed under a permanent lease from their uncle, to recover their half share of certain land. In 1888 the first plaintiff had sued the defendant in the Mamlatdar's Court to recover possession of the land, and failed. The defendant had in that case set up the permanent lease. The present suit was brought more than three years after the date of the Mamlatdar's order. Both the lower Courts held that the entire claim of the plaintiffs was barred by limitation. On second appeal by two of the plaintiffs held that the other plaintiffs who were not parties to the suit before the Mamlatdar, nor were represented in it,

were not bound by the order, and the law of limitation did not affect them.—**SYAD MIYA GULAM NABI v. RAHIM MAHOMED JAFFER**, Prin. Judg. for 1897, p. 276.

[*Possessory suit in Mamlatdar's Court—Non-appearance of plaintiff and defendant—Order rejecting the plaint—Suit in a Civil Court—Limitation.*] In a possessory suit instituted in a Mamlatdar's Court neither the plaintiff nor the defendant appeared at the hearing. The case was, therefore, disposed of by the Mamlatdar under the first part of s. 13 of the Mamlatdars' Courts Act (Bombay Act III of 1876). *Held*, that the order of the Mamlatdar was an order rejecting the plaint.

A regular suit for possession having been brought in a Civil Court more than three years after the above order of the Mamlatdar ; *Held* that the suit was time-barred under article 47, Schedule II of Limitation Act (XV of 1877).—**PURUSHOTAM v. CHATARGIR**, I. L. R. 25 Bom. 82 ; S. C. 2 Bom. L. R. 680.

[*Math—Manager—Possessory suit in Mamlatdar's Court in a personal and private capacity—Subsequent civil suit in a representative capacity—Art. 47, Sch. II, Act XV of 1877.*] The defendant took the house in dispute on lease from one Raghunathdas his disciple, the present plaintiff, brought a possessory suit in the Mamlatdar's Court against the defendant, and the Mamlatdar on the 6th May, 1889, dismissed the suit on the ground that by not producing a succession certificate the plaintiff had failed to establish his title as heir to Raghunathdas. Subsequently the plaintiff, describing himself as the manager of the math, brought the present suit on the 7th February, 1900, to recover possession of the house and rent or damages for use and occupation. It was contended that the suit was time-barred under Art. 47, Sch. II, of the Limitation Act (XV of 1877), it being not brought within three years from the date of the Mamlatdar's order :—

Held, that the suit was not time-barred under Art. 47, Schedule II of the Limitation Act (XV of 1877), because the first suit in the Mamlatdar's Court was brought by the plaintiff in his personal and private capacity, while the second suit was brought by him as manager and on behalf of the math.

In connection with the property of a math there are two distinct classes of suits ; those in which the manager seeks to enforce

his private and personal rights and those in which he seeks to vindicate the rights of the math.

A math like an idol is, in Hindu Law, a judicial person capable of acquiring, holding and vindicating legal rights through the medium of some human agency. When the property is vested in the math, then litigation in respect of it has ordinarily to be conducted by, and in the name of, the manager, not because the legal property is vested in the manager, but because it is the established practice that the suit should be brought in that form. But a person in whose name the suit is thus brought has in relation to that suit a distinct capacity ; he is therein a stranger to himself in his personal and private capacity in a Court of law.

An order in a Mamlatdar's suit does not give rise to the bar to which explanation II of section 13 of the Civil Procedure Code (Act IX of 1882) relates.—BABAJIRAO v. LAXMANDAS, I. L. R. 28 Bom. 215 ; S. C. 5 Bom. L. R. 932.

Editor's note.—If a person, who is a manager of a certain math, bring in the first instance a suit in the Mamlatdar's Court as a private person concealing his character as a manager of the math, he is a wrong-doer, and he should not be allowed to take advantage of his own wrong. He does not appear before the Court with clean hands. Besides this the rule of law is, that multiplicity of proceedings should be avoided. Two reasons may be assigned for not allowing the second: action the one, public policy, for *interest rei publicae ut sit finis litium*; the other, the hardship on the individual that he should be twice vexed for the same cause, *nemo debet bis vexari pro una et eadem causa*.

[*Rejection of plaint by Mamlatdar—Subsequent suit for possession in ordinary Court on title—Art. 47, Sch. II of the Limitation Act (XV of 1877).*] A plaintiff suing in the ordinary Court on his title for the possession of land is not bound by reason of anything in Art. 47 of the Limitation Act (XV of 1877) or section 21 of the Mamlatdars' Act (Bombay Act III of 1876) contained to bring his suit within three years from the previous rejection of his plaint by a Mamlatdar in suit for the possession of that land. As a suit on title is outside the Mamlatdar's jurisdiction, it is impossible to hold that a mere rejection of a plaint by him can be treated as an order binding the plaintiff in reference to that which is the cause of action in a suit on title.—TUKARAM v. HARI, I. L. R. 28 Bom. 601 ; S. C. 6 Bom. L. R. 612.

(b) "Three years."

[*Act XVI of 1838—A person bound by order—Suit within three years.*] A Mamlatdar was competent to make an order as to possession under cl. 2 of s. 1 of Act XVI of 1838. Held that defendant, against whom such an order had been made in 1864, not having sued within three years, was precluded from asserting any title not acquired by subsequent possession.—*BAPU KHANDU v. BAJI JIVAJI*, Prin. Judg. for 1889, p. 305.

[*Dispossession by Mamlatdar's order—Suit for partition—Limitation.*] Plaintiff, in 1876, filed a suit to establish his right to and to recover a fourth share of certain property which he alleged to be ancestral. He stated his cause of action to have accrued on the 17th May 1871, on which day he had been dispossessed by an order by the Mamlatdar, made under Bombay Act V of 1864. The District Court held that the suit was barred by Art. 46, Sch. II of the Limitation Act IX of 1871. Held by the High Court, on special appeal, that Art. 46 did not apply to a partition suit and that the suit was not barred.—*BHAGUJI v. ANIABA*, I. L. R. 5 Bom. 25

[*Rejection of suit for possession by Mamlatdar—Rejection of subsequent regular suit for possession—Suit for partition—Limitation.*] The plaintiff S sued N and three others to recover possession, by partition, of his fifth share in a field No. 159, situated at the village of Gonde in the Taluka of Sinnar. In 1871, the plaintiff sued V (defendant No. 3) in the Mamlatdar's Court for possession of the northern portion of the field in dispute under Bombay Act V of 1864. On the 11th August of that year, the Mamlatdar rejected the plaintiff's claim and gave possession of the land to V. The plaintiffs thereupon brought a regular suit (No. 1126 of 1871) for possession of the land awarded by the Mamlatdar to V, alleging that it had been allotted to him by partition. The Court on the 20th October, 1875, rejected the plaintiff's claim on the ground that no partition had taken place. The plaintiff, therefore, brought the present suit on the 5th February, 1878, for partition of the field in dispute and for possession of his fifth share therein. Defendant V pleaded, among other things, that the claim was barred by the previous suit (No. 1126 of 1871). On appeal by the plaintiff to the High Court it was held that Art. 46 of Sch. II of Act IX of 1871 was not applicable to a partition suit (*BHAGUJI RAGUJI v.*

ANABA, I. L. R. 5 Bom. 25 followed. Held also that the present suit for partition was not barred by the previous suit which was brought to establish the plaintiff's sole right to the lands in question.—SHIVRAM v. NARAYAN, I. L. R. 5 Bom. 27; S. C. Prin. Judg. for 1880, p. 212.

[*Dismissal of suit by Mamlatdar—Confirmation of the defendant in possession—Suit for the same property in the Civil Court—Limitation.*] The plaintiff sued the defendants in the Mamlatdar's Court for certain property in 1872. The plaintiff wanted to withdraw this suit. But the Mamlatdar did not allow the plaintiff to withdraw; but on the ground that his claim was not proved, dismissed it. The plaintiff did not thereafter bring his suit in a Civil Court until 1880. Held by the High Court that when a plaintiff claims in any Court possession of a piece of ground, and his claim is dismissed for lack of proof, the effect of the Court's order dismissing the claim is necessarily to confirm the defendant in possession. As the present suit was not brought until 1880, the claim was barred by Art. 47 of Sch. II of Act XV of 1877.—CHINTO GANESH BHATE v. VISHNU GANESH BHATE, Prin. Judg. for 1883, p. 131.

[*Mamlatdar's order for possession—Suit to set aside the order—Extinction of remedy—Title by prescription—Suit for partition—Limitation.*] A sued D before the Mamlatdar for the possession of certain property, and in 1864 the Mamlatdar decided in favour of A. D did not sue to set aside this order within three years, but in 1874, D and his brothers obtained possession of the property, and they have been in possession ever since. In 1886, C, the assignee of A, sued D and his brothers for partition. Held, that as it has always been held in Bombay that Act XIV of 1859 did not repeal the section which existed in Regulation V of 1827 regarding the acquisition of title by prescription, it was only in those cases in which the possession was of such duration as to come within that Regulation that the original title was extinguished in 1887. Then the title of D and his brothers was not extinguished, though their remedy for asserting it was barred under cl. 7 of s. 1 of Act XIV of 1859, and their possession in 1874 could be referred to the then subsisting title.

A suit for the partition of property comprised in a Mamlatdar's order, is not a suit to recover such property under s. 1, cl. 7 of Act XIV of 1859.—PARSHRAM JETHVAL v. RAKHMA VALAD

KHANDU, I. L. R. 15 Bom. 299 ; S. C. Prin. Judg. for 1890, p. 310.

[*Finding by Mamlatlar as to possession—Subsequent contrary finding by Civil Court—Mamlatlar's order not conclusive—Suit by party against whom Mamlatlar's order made—Limitation.*] The plaintiff brought this suit to recover possession of certain land which had belonged to her nephew, and of which after his death in 1878 she had assumed the management. In 1881 she brought a possessory suit against the first defendant in the Mamlatdar's Court, which suit was dismissed in January, 1885, the Mamlatdar holding that she had not been in possession. In a civil suit, however, which (pending the proceedings in the Mamlatdar's Court) she had filed against the first defendant in the Court of the Subordinate Judge of Haveri, the Judge found that she had been in possession since 1880, and awarded her damages against the first defendant (who was held to be her farm servant) for crops which had been taken away by him. In 1887 the second defendant as mortgagee from defendant No. 1 obtained a decree against plaintiff in the Mamlatdar's Court awarding him possession of the land, and in execution of that decree the plaintiff was dispossessed in December 1887. In 1890, the plaintiff filed this suit to recover possession and for mesne profits since 1887. The defendant pleaded that the plaintiff had no title to the land and that the suit was barred by limitation, inasmuch as the plaintiff had not brought a suit to establish her right within three years after the Mamlatdar's order in 1885 dismissing her possessory suit. *Held*, that the Mamlatdar's order of January, 1885, had no conclusive effect and was rendered ineffectual by the subsequent decree of the Civil Court ; and as the plaintiff continued in possession, notwithstanding that order, down to 1887, the present suit was not barred by limitation, and neither her remedy nor her right to the land was extinguished.—*Held* also, that the plaintiff's possession prior to 1887, confirmed as it was by the decree of the Civil Court in 1885 and by the finding of the lower Court of Appeal in the present case, must prevail against the defendant, who claimed through plaintiff's farm servant only and whose possession commenced with the disturbance which compelled the plaintiff to bring the suit.

Possession is *prima facie* evidence of title and is primarily exclusive, and it is for him who impugns this exclusive title to show

that the possession originated in a way not to affect his own right.—
KRISHNACHARYA v. LINGAWA, I. L. R. 20 Bom. 270; S. C. Prin. Judg. for 1895, p. 38.

[*Mamlatdar's decision binding against actual party to suit*—*Order against Mukhtyar how far binding against principal*—*Art. 47, Sch. II, Act XV of 1877.*] Plaintiff Janabai brought this suit in the year 1895 to recover possession of certain lands together with mesne profits, alleging that the deceased father of defendants 1, 2 and 3 was her yearly tenant who paid her the rent till the year 1894 and that he refused to quit the lands though a notice was given to him. Defendant 4 was made party to the suit as he was in possession of a part of the property in suit.

Defendants 1 and 2 contended *inter alia* that they held the lands in suit as Mirasi tenants at a fixed annual rent: that the adopted son of plaintiff and that of Gangabai the widow of one Parashram who were interested in the lands were necessary parties and that this suit was barred by limitation as defendant 2 had obtained in the year 1890 a decree for injunction from the Mamlatdar directing plaintiff's Mukhtyar Ramchandra to refrain from interfering with his possession of the lands in dispute and no attempt had been made to set aside that decree within three years from its date.

The Subordinate Judge awarded plaintiff possession of the lands together with mesne profits. The District Judge reversed this decree and dismissed the suit on the ground that the suit not having been brought within three years from the date of the Mamlatdar's order of the year 1890, was barred by Article 47 of the Limitation Act. On second appeal against this decision by the adopted son of Janabai deceased the High Court passed the following:—

Judgment.—“The suits in the Mamlatdar's Court decided in 1890 were brought by the second defendant against Ramchandra Sakharam with the result that the latter was enjoined to refrain from interfering with the defendant's possession of the lands in dispute. Ramchandra was the *vat-mukhtyar* of the present plaintiff, but it does not appear that he was sued as such, probably he was not, since it is necessary, under the Mamlatdar's Act, that a suit shall be brought against the actual person causing obstruction. The

present suit was brought by the plaintiff to eject the defendants from the same lands on the allegation that they were her tenants and that they refused to quit after due notice. The District Judge thinks that the plaintiff was bound by the order passed against her Mukhtyar since she was effectively represented in the proceeding before the Mamlatdar, and that her suit is barred since she has taken no steps to avoid the result of the suit within three years. We do not agree with him. The only person bound by an order under the Bombay Mamlatdars' Courts Act would be the actual party to the suit, because the order cannot affect or be executed against any one else, as has been repeatedly ruled by this Court. This view of the case makes it unnecessary for us to consider whether Article 47 of the Limitation Act would apply at all to an order granting an injunction only, and whether, if section 21 of the Mamlatdar's Act were relied upon, the ruling of this Court in *MAHADEV v. BAPU* (Prin. Judg. for 1888, p. 6) would not govern it. Apparently, the latter is a very similar case to the present one in which the defendant's suit before the Mamlatdar was brought in his capacity as a tenant entitled to the possession of the land for the term of his tenancy, and he admitted that his landlord was Parashram, who is said to have been a co-sharer with the plaintiff in the land in suit, and whose title the plaintiff has now become possessed of. Here, too, as there, the cause of action has nothing whatever to do with the order of the Mamlatdar, but is founded on a distinct cause of action, which arose only on the refusal of the defendants to obey the notice to quit given after 1894. We reverse the decree of lower appellate Court and remand the appeal for retrial on the merits.—*JANABAI KOM NARSINGRAO SHINDE v. APPAYA BIN SATTEPPA BAVACHI*, Prin. Judg. for 1898, p. 234.

(c) "From the date of the final order."

The date of the Mamlatdar's order will not always be the date of the final order. If the High Court, in the exercise of its extraordinary jurisdiction, call for the papers of any case, then the date of the final order will be the date of the order passed by the High Court.

[*Suit for exclusive possession—Subsequent suit for partition and to set aside the Mamlatdar's order—Res judicata—Cause of action—Limitation.*] A, against whom a Mamlatdar's order had been passed under Bombay Act III of 1876 declaring that he had wrong-

fully dispossessed B of the land in dispute and ordering him to deliver up possession, subsequently filed a suit for a declaration that the property belonged exclusively to him, giving as his cause of action the Mamlatdar's order, and failing in that suit filed a further suit to set aside the same order of Mamlatdar and to obtain a share in the land by partition. *Held*, that A was as much bound by the Mamlatdar's order in the one suit as in the other, since, relating as it did to the whole land, it was a direct bar to his rights whether as sole or co-owner, and that he could not shift the date of his cause of action from the order of the Mamlatdar awarding possession to B to a subsequent date on which B was actually put into possession under the order.—*BAI LULI v. HAJI BAVANJI*, Prin. Judg. for 1893, p. 559.

(B)“ MESNE PROFITS.”

These words mean profits derived from land whlst the possession of it has been improperly withheld (a).

(C)“ SHALL NOT BE HELD TO BE CONCLUSIVE.”

[*Mamlatdar's order—Evidence of possession.*] A Mamlatdar's order is not conclusive evidence of the facts of possession and dispossession between the parties. See *BASAPA v. LAKSHMAPA* (I. L. R. 1 Bom. 624); *LILLU BIN RAGHUSHET v. ANNAJI PARASHRAM*, I. L. R. 5 Bom. 387.

[*Mamlatdar's decision—Evidence of possession.*] In a suit to recover possession brought within 6 months from the date of dispossession, the Mamlatdar's decision, in a proceeding under Bombay Act V of 1864, that the plaintiff was not in possession, is not conclusive.—*MUDKAPA TAYAPA v. NINGAPA BASAPA*, Prin. Judg. for 1877, p. 115.

[*Mamlatdar's decision—Evidence of possession—Proof of title in Civil Court.*] The decision of a Mamlatdar, deciding that a defendant has a right to possession founded on previous possession, is binding on the Civil Court, and a plaintiff can only succeed by establishing a title superior to that of the defendant.—*Prin. Judg. for 1875*, p. 239.

[*Possession given by Mamlatdar—Evidence of title.*] The possession awarded by a Mamlatdar is *prima facie* proof of title.—*Prin. Judg. for 1875*, p. 289.

(a) Wharton's Law Lexicon, 10th Ed.

[*Act XVI of 1838—Bom. Act V of 1864—Effect of order.*]

The second proviso in this section which enacts that the Mamlatdar's order is not to be conclusive respecting possession of property or the enjoyment of any use, is introduced *pro maiori cantela*, and it does not afford any inference that under Act XVI of 1838, or Bombay Act V of 1864, it was conclusive.—**BASAPA BIN MURTIAPA v. LAKSHIMAPA BIN MARITAMAPA**, I. L. R. 1 Bom. 624, p. 627.

[*Rejection of plaint—S. 13, Civil Procedure Code—Res judicata—S. 9 of the Specific Relief Act.*] The rule of *res judicata* is laid down in s. 13 of Act X of 1877, and the rejection of a plaint under s. 13 of Bombay Act III of 1876 is a hearing and final decision of the suit within the meaning of s. 13 of the Civil Procedure Code. Consequently a plaintiff, whose plaint has been rejected for default in the Mamlatdar's Court under Bombay Act III of 1876, is debarred from bringing another possessory suit on the same cause of action in the Civil Court under s. 9 of the Specific Relief Act, 1877.—**RAMCHANDRA LACHIRAM MARWADI v. BHUKUBAI MARD ABAJI**, Prin. Judg. for 1882, p. 160.

[*Dismissal of suit by Mamlatdar—S. 13 of Bombay Act III of 1876—S. 28 and Art. 47 of Act XV of 1877—Effect of Mamlatdar's decision.*] In 1883 the defendant's predecessor P sued plaintiff's tenant A in the Mamlatdar's Court, alleging that A had disturbed his possession by piling sweepings upon the land in dispute, and asked to be protected in his enjoyment of it. He did not appear on the day fixed for the hearing, and the suit was dismissed under s. 13 of Bombay Act III of 1876. He did not file a suit to set aside this order. In 1890 the defendant sued A in the Mamlatdar's Court in respect of a further placing of rubbish on the land, and obtained an order, after which A removed not only the further deposit of rubbish, but also the original heap. In 1891 plaintiff sued the defendant in ejectment. The latter denied plaintiff's title. Plaintiff contended that by the combined operation of Article 47 and s. 28 of Act XV of 1877, P after three years from the date of the Mamlatdar's order in 1883 lost his title to the land, which then became vested in A. Held that the suit not being to have it declared that A or the plaintiff is entitled to deposit rubbish on the land, but being on the title by the plaintiff to eject the defendant, is not affected by the decision of the Mamlatdar in 1883, except in so far as the proceedings and decree in his Court in 1883 can be relied on

as proof of title in A or the plaintiff.—RAJARAM v. GANESH HARI, I. L. R. 21 Bom. 91 ; S. C. Prin. Judg. for 1895, p. 367.

[*Kabulyat—Genuineness—Suit for rent—Mamlatdar's decision for plaintiff—S. 13, Regulation XVII of 1827—Act XVI of 1838—S. 13, Act XIV of 1882—Suit for possession by plaintiff in a Civil Court—Res judicata.*] In 1864 the plaintiff filed a suit in the Mamlatdar's Court to recover certain rent due under a kabulyat. The defendant denied the existence of the kabulyat. The Mamlatdar held it to be proved and awarded the plaintiff's claim.

The plaintiff in 1892 filed a suit to recover possession of the land with a small balance due for assessment and the swamitwa (premium) for the three years preceding suit. The defendant contended *inter alia* that he did not execute the rent-note. The Subordinate Judge held that the execution of the rent-note was *res judicata* by the Mamlatdar's decree of 1864. The District Judge held that the issue between the parties was not *res judicata*. On this point the decision of the High Court is as follows :—

The first question to be determined, therefore, is as to the force and effect between the parties of the decree passed by the Mamlatdar in 1864. At that time the Collector, under Bombay Regulation XVII of 1827, s. 31, was vested with the Civil cognisance of all disputes regarding rent for the current or former year which the farmer on the one hand or the ryot on the other might desire to submit to civil adjudication. Regulation VI of 1830, s. 5, gave an appeal from the decision of the Mamlatdar to the Collector, and in suits of the value of more than Rs. 1,000 an appeal from the Collector to the Sadar Diwani Adalat and in all suits a special appeal to the latter tribunal. In 1864, the Revenue Courts had thus plenary jurisdiction in all rent suits, but the cognisance of suits for the possession of land had then been taken from them by Act XVI of 1838.

The cause of action in the suit of 1864 was the non-payment by the defendant of the rent then due. The plea of the defendant in substance raised the issues whether the lease had been executed by the defendant and whether it was binding upon him. The latter question was not indeed directly raised, but it was a matter which might and ought to have been ground of defence in that suit, and, therefore, must be deemed to have been a matter directly and sub-

stantially in issue in it : Explanation II of section 13 of Act XIV of 1882. It is plain, therefore, that the validity of the lease in question was adjudicated upon in the suit of 1864, and if the Court which decided it was a Court of concurrent jurisdiction with the Court which decided the present suit, it is manifest that the validity of the lease could not now be called in question.

The test laid down in section 13 of Act XIV of 1882 to determine whether trying Courts are Courts of concurrent jurisdiction when applied to the present case is : " Could this suit have been brought in the Mamlatdar's Court ? " The answer must be in the negative. In this suit the questions directly at issue are the defendant's title to the land and the right of the plaintiff to evict him from it. The Mamlatdar could not have entertained in 1864 a suit of that nature. His jurisdiction extended only to disputes as to rent, and though in deciding such disputes he incidentally decided the question of the defendant's title to the land against him and in a sense favourable to the plaintiff, he only did so incidentally. He had no jurisdiction to determine it directly, and his decision upon the question is not binding in the present suit. The Privy Council ruling in KHUGOWLEE SING v. HOSSEIN BUX (7 Beng. L. R., p. 673) cannot, we think, be distinguished from the present case, see pp. 679 and 680. BOISTUB CHURN v. TRAHEE RAM (15 W. R. p. 32) and MESS BABUR ALI v. SHAIKH DOWLUT ALI (19 W. R. p. 217) are also authorities to the same effect. These were decisions under Act X of 1859, but the jurisdiction of the Collector under that Act was similar to that which the Collector in 1864 exercised under the Bombay Act.—HARI ANANT JOSHI v. LAKSHMAN HARI PATEL, Prin. Judg. for 1896, p. 189.

[*Mamlatdar's award—Execution—Dispossession of a third person—Remedy of person so dispossessed.*] G got a decree for possession against P in a Mamlatdar's Court. In execution the Mamlatdar directed the ouster of C, who was in possession and who was not a party to the decree. Held, that the Mamlatdar's order for execution of the decree by the ouster of C was without jurisdiction, and that it should be set aside under section 622 of the Civil Procedure Code (Act XIV of 1882). If C is actually dispossessed under that order, his remedy to recover possession is by suit either

before the Mamlatdar or in a Civil Court.—CHINAYA v. GANGAVA, I. L. R. 21 Bom. 775 ; S. C. Prin. Judg. for 1896, p. 194.

[*Decree for possession by Head Karkun—Subsequent decree for possession by a Mamlatdar.*] A decree under the Mamlatdars' Act, having been passed by a Head Karkun having jurisdiction in the matter, confirming one in possession, a Mamlatdar cannot pass a second decree depriving him of such possession. He is entitled under s. 18 of the Mamlatdars' Act to be continued in such possession until ousted by a decree or order of a Civil Court.—BHIMJI BIN SAKHARAM v. GENU BIN AKU, Prin. Judg. for 1898, p. 71.

23. (1) There shall be no appeal (A) from any order passed by a Mamlatdar under this Act.

(2) But the Collector may call for (B) and examine the record of any suit under this Act, and if he considers that any proceeding, finding or order in such suit is illegal or improper, may, after due notice to the parties, pass such order thereon, not inconsistent with this Act (C), as he thinks fit.

Collector's power to revise Mamlatdar's proceedings.

(3) Where the Collector takes any proceedings under this Act he shall be deemed to be a Court (D) under this Act.

Collector deemed to be a Court.

(A) "NO APPEAL."

As the possession is merely meant to be temporary and to be carried out only until the dissatisfied party should obtain a decree or order of the Civil Court, it was thought advisable that no appeal should lie from the decision of the Mamlatdars.

(B) "BUT THE COLLECTOR MAY CALL FOR."

Under the Bombay Act III of 1876, the Collector had no power to interfere with the Mamlatdar's order either by way of

revision or by way of reference to the High Court (a). But under cl. 2 of this section power is given to the Collector to *revise* the Mamlatdar's proceedings. Yet he has no power to make a reference to the High Court.

If a forum is provided into which people can easily go, they are sure to go there. Thus the desired summary character of the procedure will be destroyed. This will involve considerable expenditure which it is desirable to save. If an application be made to the Collector, it will in most cases be necessary for him to call for and scrutinize the papers. When one considers that it is almost certain that applications for revision will be the rule and not the exception, it may be judged at once what an enormous addition will be made to the work of the Collector, who, like the Mamlatdar, but in a greater degree, is already overburdened with work. No officer can, physically speaking, work more than a certain number of hours in the day and after the limit of his powers is reached any extra time given to one duty is taken from another. Therefore if a considerable amount is added to the Collector's work, the efficiency of his work in other branches is almost bound to suffer. It might be said that a Collector would not interfere except in cases where interference was necessary. But before the Collector comes to that decision conscientiously he must look into the papers, and this involves further time and trouble (b).

(C) "NOT INCONSISTENT WITH THIS ACT."

The Collector is bound by s. 19 to confine himself to the determination of the issues mentioned in that section. He has no power to take any additional evidence or to remand the

(a) RAVLOJIRAO v. SATU, Prin. Judg. for 1879, p. 5 ; VORA ISABALI v. DAUBHAI MUSABHAI, I. L. R. 14 Bom. 371 ; S. C. Prin. Judg. for 1889, p. 266 ; SATU BIN KEDARI KHAMBYA v. SHIVRAMBHAT BIN BABAJI BHAT, Prin. Judg. for 1894, p. 52 ; PANDOO VALAD MALHARI v. BHAVDU VALAD MAHADU, I. L. R. 21 Bom. 806 ; S. C. Prin. Judg. for 1896, p. 195.

(b) See the Legislative Proceedings published in the Bombay Government Gazette, dated 26th September 1906, Part VII, page 205 *et seq.*

case to the Mamlatdar for further inquiry. He cannot make any order as to costs ; for sub-s. 4 of s. 19 *ante* says that the costs shall follow the decision. The Collector can interfere with the Mamlatdar's proceeding, finding or order *only* if there be any *illegality* or *impropriety* ; and he is required to pass an order strictly in conformity with the provisions of this Act.

There is no express provision for the recovery of the costs in the Collector's Court.

As to the execution of his order regarding the restoration of possession, use or the grant of injunction or the recovery of costs, it appears that the provisions contained in s. 21 will, *mutatis mutandis*, apply to it. But unless there is some express provision, the law is imperfect.

There should be some provision for the stay of execution by the Mamlatdar of his order until the decision of the Collector in cases under revision, or of the High Court in the event of its exercising its extraordinary jurisdiction in any case.

(D) "SHALL BE DEEMED TO BE A COURT UNDER THIS ACT."

Under the former law a Mamlatdar was not subordinate to the Collector and therefore the Collector had no authority to grant sanction for the prosecution of a person for having given false evidence before a Mamlatdar (a). But now under this section a Mamlatdar is subordinate to the Collector and under cl. (3) of this section the Collector is a Court. The Collector is, therefore, for the purposes of this Act, a Civil Court ; and can, therefore, give sanction for the prosecution of a person under s. 195 of the Criminal Procedure Code for any offence mentioned therein and committed either before a Mamlatdar or before himself.

Since, as mentioned above, a Collector is a Civil Court, the High Court can call for the proceedings before him in the exercise of its extraordinary jurisdiction under s. 622 of the Civil Procedure Code, 1882, and pass such orders as may seem proper and equitable.

(a) REG. v. DHONDI SHIVRAM, Statement of Bom. Cr. Rul. 21st, Nov., 1876.

The power of the Collector to apply to the High Court under s. 50 of the Indian Stamp Act.

[*Admission of unstamped document in evidence—s. 50 of Act I of 1879—Reference by Collector.*] As no appeal or reference lies to the High Court from the Court of the Mamlatdar, it is not open to the Collector to make an application to the High Court under s. 50 of the Indian Stamp Act, in reference to a document received in evidence by the Mamlatdar.—**DAYALJI KHANDUBHAI v. VAMAN SHRIDHAR**, Prin. Judg. for 1897, p. 118.

The Extraordinary Jurisdiction of the High Court.

The High Court may call for the record of any case in which no appeal lies to the High Court, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity; and may pass such order in the case as the High Court thinks fit (a). This applies to the Mamlatdars' Courts in the Bombay Presidency (b). Where a lower Court has jurisdiction to decide a question of law or fact, the High Court has no power to interfere on revision with the decision on those questions (c).

Applications to the High Court for the above purpose should be made without delay (d); otherwise the High Court will not interfere (e).

A Collector cannot make a reference under s. 622 of the Civil Procedure Code, inviting the High Court to set aside a Mamlatdar's decision in possessory suit (f).

(a) S. 622, Civil Procedure Code, 1882.

(b) **NANA BAYAJI v. PANDURANG VASUDEV**, I. L. R. 9 Bom. 97; S. C. Prin. Judg. for 1884, p. 234.

(c) **KRISHNA MOHINI v. KEDAR NATH**, I. L. R. 15 Cale. 446.

(d) **DURGA PRASAD v. SHEO CHARAN**, I. L. R. 4 All. 154; **BALMUKUND v. SHEO JATAN**, I. L. R. 6. All. 125.

(e) **RADHA MOHUN v. RAJ CHANDER**, 22 W. R. 522; **BHUGGOBUTTY v. MONEY**, 2 C. L. R. 545.

(f) **PANDU v. BHAVDU**, I. L. R. 21 Bom. 806.

The High Court will not exercise its revisional jurisdiction as long as there is any other remedy open to the applicant (a). When it is open to the parties aggrieved to establish their right by a regular suit, the High Court will not interfere (b). In a suit for possession when the Mamlatdar had not declined jurisdiction, but had considered the materials before him and come to a conclusion, the Bombay High Court declined to interfere, holding that the aggrieved parties' remedy lay in a separate suit (c).

The expression " *material irregularity* " in s. 622 means an irregularity in procedure which has produced error or defect in the decision of the case upon the merits (d). Treating the delivery of a summons by post to a person not shown to be the defendant as good service is a material irregularity (e). The High Court will not set aside the judgment of a lower Court upon a mere technicality (f) ; or upon mere irregularity, unless a failure of justice has occurred (g).

[*Mamlatdar's Court—Extraordinary jurisdiction of High Court—Power of Superintendence—Reg. II of 1827, s. 5, cl. 2—Stat. 24 & 25 Vict. Cap. 104, s. 15—Bombay Act V of 1864.*] A suit was brought by Sonu against Mahadaji Govind for restoration of possession of certain immoveable property and the Mamlatdar ordered possession of the disputed property to be restored to Sonu. An application was made to the High Court for the exercise of its extraordinary jurisdiction on the ground that as the suit was filed more than six months from the time of dispossession, the Mam-

(a) *GUISE v. JAISRAJ*, I. L. R. 15 All. 405 ; *GOPAL DAS v. ALAFKHAN*, I. L. R. 11 All. 383 ; *SHEO PRASAD v. KASTURA KUAR* I. L. R. 10 All. 119. But see *GHULAM SHABBIR v. DWARKA PRASAD*, I. L. R. 18 All. 163.

(b) *BHUNDAL PANDA v. PANDOL POS PATIL*, I. L. R. 12 Bom. 221.

(c) *KASHINATH v. NANA*, I. L. R. 21 Bom. 731.

(d) *BADAMI KUAR DINU RAI*, I. L. R. 8 All. 111 ; *SEW BUX v. SHIL CHUNDER*, I. L. R. 13 Calc. 225.

(e) *JAGGANNATH v. SASOON*, I. L. R. 18 Bom. 606.

(f) *ASHARFI LAL v. DEPUTY COMMISSIONER OF BARA BAN-*
KI, I. L. R. 22 Calc. 729 ; *S. C. L. R. 22 I. A.* 90.

(g) *BISHNOCHUNDER v. SHOSHEE MOHUN*, 22 W. R. 277.

latdar had no jurisdiction. It was contended by the opponent that the power vested in the Sudder Dewance Adawlut by cl. 2, s. 5 of Reg. II of 1827, was to be exercised only in the case of Courts which that Regulation constituted and not in the case of Courts constituted by any other law, and therefore the Mamlatdars' Courts are not subordinate Civil Courts within the meaning of that Regulation. The judgment of the High Court was delivered by—

SARGENT, C. J. :— * * * What is called the extraordinary jurisdiction of the High Court (as distinguished from its general power of superintendence vested in it by section 15 of Stat. 24 and 25 Vict., Cap, 104) is derived from clause 2, section 5, Regulation II of 1827, which is as follows :—

" It shall also be competent to the said Court (the Sudder Dewanee Adawlut) to call for the proceedings of any subordinate Civil Courts and to issue such orders thereon as the case may require."

This power, which has been transferred to the High Court by section 9 of the above Statute, enables this Court to pass any order it may see fit in regard to the proceedings of any Civil Court subordinate to it. The words of the law impose no limit on the exercise of the power ; but the High Court has, in its discretion, constantly refused to exercise its extraordinary jurisdiction except in cases which disclose some grave and patent error, not otherwise to be remedied. The questions which we have to consider are, (1) whether the Mamlatdar's Court is a Subordinate Civil Court, and if so, (2) whether the present application discloses a fit case for the exercise of our extraordinary jurisdiction.

As to the subordination of the Mamlatdars' Courts to the High Court, there can, we think, be no question. Though Bombay Act V of 1864 confers upon the Mamlatdars' Courts a new jurisdiction, it expressly declares the Courts to be the same Courts which are referred to in Regulation VI of 1830, which Regulation provided that an appeal should lie from the decisions of those Courts to the Collector or Sub-Collector, and from that officer to the Sudder Dewanee Adawlut. Thus the Mamlatdars' Courts were distinctly subordinated to the Sudder Dewanee Adawlut, and any powers which the Sudder Dewanee Adawlut had, by virtue of such subordination, have been transferred to the High Court. If the Mamlatdars' Courts were subordinate to the Sudder Dewanee Adawlut, under Regulation VI of 1830, they are subordinate to the High Court

now. The circumstance that Regulation VI of 1830 has been repealed by Bombay Act II of 1866, and that Bombay Act V of 1864 makes no provision for appeals from the Mamlatdars' Courts does not affect the question. The High Court cannot be deprived of any power vested in it by its Charter over subordinate Courts by any Act of the Bombay Legislature ; nor, it may be added, is there any reason to suppose there was an intention to deprive it of such power.

The whole question then resolves itself into this. Are the Mamlatdars' Courts "Civil Courts" within the meaning of cl. 2, s. 5, Reg. II of 1827? It has been argued before us that the sole object of that clause was to give to the Sudder Dewanee Adawlut a control over the Courts which were constituted by that Regulation. But we see no reason to think that such was the intention. On the contrary, it seems unreasonable to suppose that there could have been intention to give to the highest court of appeal a general power of interference, in regard to a particular class of suits, and to exclude that power in regard to another class of suits of a similar character and of at least equal importance. For a reference to Chapter VIII of Regulation XVII of 1827 (which Regulation was passed simultaneously with Regulation II of 1827) shows that the class of cases assigned to what were ordinarily called the Revenue Courts, included all claims for the possession of lands and other questions of a civil nature involving the most important interests of the community.

It would be difficult to believe, and certainly should not be assumed without strong evidence, that the Legislature, while constructing the same machinery of appeal from the Revenue, as from the ordinary Civil Courts, thought it desirable to give to the highest court of appeal an additional power of interference with regard to the proceedings of the ordinary Civil Courts, but refused to give it the same power to remedy similar failures of justice in the Revenue Courts. So far from there being any strong evidence of such intention we think that the words of cl. 4, s. 21, Regulation II of 1827, which speak of the suits "which come under the civil cognizance of the Collector in pursuance of Chapter VIII, Regulation XVII A. D. 1827," and the provisions of the last-mentioned Chapter (and particularly section 22), declaring that in their proceedings generally the Revenue Courts should be held to be Courts of Civil Judicature, sufficiently indicate that the power of the

Sudder Dewanee Adawlut to call for the proceedings of the subordinate Civil Courts under cl. 2, s. 5, Regulation II of 1827 was intended to apply to the Revenue Courts created by Regulation XVII as well as to the ordinary Civil Courts constituted by Regulation II of 1827.

It is scarcely necessary to add that the power thus given, to call for the proceedings of the Collector's Court as being a Subordinate Civil Court, necessarily involved, upon the passing of Regulation VI of 1830, the power to call for the proceedings of the Mamlatdar's Court, which was subordinate to that of the Collector.—MAHADAJI GOVIND V. SONU BIN DAVLATA, 9 Bom. H. C. R. 249.

[*Mamlatdar's Court—High Court—Powers of superintendence and revision—Bombay Act III of 1876—Bombay Civil Courts' Act, XIV of 1869.*] In this case a preliminary question arose whether since the passing of the "Mamlatdars' Courts Act, 1876," (Bombay Act III) the High Court has not been divested of the powers of supervision which it previously exercised over those Courts, and was referred for determination to a Full Bench. The judgment of the Full Bench was delivered by—

M. MELVILL, J.—This case has been brought before a Full Bench, in order that it may be decided whether the effect of Bombay Act III of 1876 has been to divest the High Court of the powers of superintendence and revision which it exercised over the Mamlatdars' Courts previously to the passing of that Act.

The grounds on which the jurisdiction of this Court was founded are stated in MAHADAJI V. SONU (9 Bom. H. C. Rep 249). It seems to us that the question whether that jurisdiction has or has not been abolished can only be answered by deciding whether the intention and effect of Bombay Act III of 1876 was to abolish the old Mamlatdars' Courts and create new Courts under the same name, or whether the Act merely provided for the continuance of the old Courts with more extensive powers. In the latter case we have no doubt that the jurisdiction of this Court continues; in the former it might perhaps be necessary to hold that that jurisdiction had ceased and determined.

It must be admitted that in portions of Bombay Act III of 1876, the phraseology employed is such as to afford some ground for the agreement that the Legislature intended to make a clean sweep

of the existing Mamlatdars' Courts and of laws relating to them, and to call into existence and provide a constitution for an entirely new description of Courts. But this supposition is not in accordance with the preamble of the Act, which sets forth that the object was "to consolidate and amend the law relating to the powers and procedure of Mamlatdars' Courts," or, in other words, to bring into one consolidating and amending Act so much of the old law and such new law as appeared necessary for the continued regulation of the existing Courts. The phraseology of the Act seems to be borrowed from that of the Bombay Civil Courts' Act (No. XIV of 1869); and there is no more reason to suppose that it was the intention to substitute new Courts for the old Mamlatdars' Courts than that it was the object of the latter Act to abolish the Zilla Courts and the Courts of Principal Sadar Amins and Munsifs, and to create new Courts in their place. The intention of both Acts was to consolidate and amend, not to destroy and rebuild.

If we had more doubt than we have on this question, it would be removed by the consideration of the very great improbability that the Legislature, in giving largely increased powers to the Mamlatdars' Courts, would at the same time have exempted them from all supervision and control. The case will be returned to the Division Bench, with an intimation that in the opinion of this Bench, it has jurisdiction to deal with it.—*BAI JAMNA V. BAI JADAV*, I. L. R. 4 Bom. 168; S. C. Prin. Judg. for 1879, p. 568.

[*Mamlatdar's award for possession—Execution—Disposition of persons other than parties—Government Resolution—Res judicata—Extraordinary jurisdiction.*] The opponents had obtained a decree for the possession of certain land against the brother and father of the applicants in the Court of the Mamlatdar at Karad in the Satara District. The applicants were not parties to the suit. The decree was executed and the opponents were put into possession. Thereupon the applicants on the 19th May, 1884, presented a petition in the Mamlatdars' Court under section 4 of this Act, alleging that they had been in actual possession of the lands and had been ousted from them in execution of the decree, and praying that they might be again put into possession. The Mamlatdar was of opinion that the matter was *res judicata* and dismissed the petition. He relied on a circular of the Executive Government as his authority. The applicants applied to the High Court under the extra-

ordinary jurisdiction. It was held that it was not a case for the exercise of the extraordinary jurisdiction of the High Court. The Mamlatdar was, no doubt, guilty of a formal error. In the exercise of his judicial functions he was bound to be governed by the law as he understood it, or as it had been expounded by superior judicial authority, nor as it was understood or expounded by unjudicial persons. This, however, was merely an irregularity on the part of the Mamlatdar not apparently involving an injustice to the applicants, who might bring a suit on their title if they had a title.—
NANA BAYAJI v. PANDURANG VASUDEV, I. L. R. 9 Bom. 97 ; S. C. Prin. Judg. for 1884, p. 234.

[*Mamlatdar's finding on first issue unsatisfactory—Extra-ordinary Jurisdiction—Non interference by High Court.*] On an application by the plaintiff Maneklal Jamietmal, the High Court passed the following decision :—

“ The judgment recorded by the Mamlatdar on the second issue would perhaps have authorised an order by this Court in favour of the plaintiff in regard to the lands found to be in the possession of three of the defendants, if the finding on the first issue had been altogether satisfactory ; but we make no such order, as the finding on the first issue, even though it be held to be binding on us, can scarcely be said to be satisfactory. It is clear that though the Mamlatdar finds that the plaintiff was in possession of the land of which he seeks possession, within six months before the suit was filed, he nowhere finds that possession was given to the plaintiff by his assignor (who had bought the land at a Court-sale) at any time after his assignor had obtained such possession as he had. Moreover, the assignor, Haribhai, never reduced the property purchased by him, into possession before he parted with it to the plaintiff. It was only about 11 months after he had sold the land to plaintiff, that he professed to take possession of it, and then he had no right to the possession. Having regard to the general purpose of the Mamlatdars' Courts Act, we do not think that under the circumstances of the present case, we ought to exercise the extraordinary jurisdiction of this Court on behalf of the plaintiff. The rule *nisi* granted in the case is, therefore, discharged with costs.—
MANEKLAL JAMETMAL v. JITSANG DARABHAI, Prin. Judg. for 1885, p. 156.

[*Reference by Collector—Extraordinary Jurisdiction—Reg. II of 1827, s. 5, cl. 2—Practice.*] On references from the Collector of Belgaum the High Court passed the following :—

JUDGMENT.—The power of this Court in its extraordinary jurisdiction “to call for the proceedings of any subordinate Court and to pass such orders theron as the case may require” under Regulation II of 1827, Section 5, Clause 2, was affirmed in *MAHADAJI GOVIND v. SONU* (9 Bom. H. C. R. 249), to extend over the Mamlatdars' Courts established under Bombay Act V of 1864. In *VORA ISUBALI v. DAUBHAI* (Prin. Judg. for 1889, p. 266) the above clause was treated as repealed by Act XII of 1873 apparently without the Court taking notice of the fact that this Act itself provides that it shall not affect any established jurisdiction. The clause is also treated as existing law in *VENKUBAI v. LAKSHMAN*, (I. L. R. 12 Bom. 620).

If, as the Collector of Belgaum gives reasons for holding, the Mamlatdar of Chikodi has exceeded the limits of the jurisdiction conferred on his Court, it is open to any party aggrieved to make an application to the High Court ; and it has been the practice not to interfere unless a party applies. On the whole we are of opinion that in the present case we should adhere to the practice ; and the Collector may so intimate to any party aggrieved by the Mamlatdar's decision.—*SATU BIN KEDARI KHAMBYA v. SHIVRAMBHAT BIN BABAJIBHAT*, Prin. Judg. for 1894, p. 52.

[*Decision passed by consent of parties—Decision by Mamlatdar illegal—Fact, question of—High Court, extraordinary jurisdiction.*] The applicant Ramrao brought two possessory suits in the Haveli Mamlatdar's Court for possession of two lands let to the opponent under separate leases passed on 26th October 1892. He alleged that the lands were sold to him by the opponent on 5th September 1891. On 17th February 1894, on joint application of both parties, the Mamlatdar passed an order in each case, that if within two months from that day the opponent did not pay off the applicant, the latter should take possession through the Bhag karkun. The Mamlatdar having, after the expiration of the period of two months, refused to execute the orders, the applicant made applications to the High Court in the exercise of its extraordinary jurisdiction, in which he prayed, *inter alia*, that the Mamlatdar be

ordered to give him immediate possession of the lands, as the opponent had failed to pay him off within two months from the date of the orders. In his report, which the Mamlatdar was called upon by the High Court to submit, he said that the money offered by the opponent was wrongfully refused by the applicant. The High Court passed the following :—

JUDGMENT.—The decree is one that the Mamlatdar could not legally make under the provisions of the Mamlatdars' Act—Cf. SHIDLINGAPA v. KARIBASAPA (1 rin. Judg. for 1887, p. 109)—and consent of parties could not give him power to make it. The complaint of the applicant, however, is not that the decree is bad, but that the Mamlatdar has wrongly found that the money was paid within the two months' time allowed for its payment, and has wrongly, therefore, refused to give him the possession which was decreed to him if the money was not paid. He asks us to find that the full amount of money ordered to be paid was not duly tendered by the opponent and to direct the Mamlatdar to put him into possession. We are of opinion that it is not open to us in the exercise of our extraordinary jurisdiction to go into this question of fact and that it would not be proper for us to further the execution of the irregular decree especially as the applicant has a clear remedy by suit. We, therefore, discharge the rule in both cases, but under the circumstances, without costs.—RAMRAO TATYAJI PATIL v. BABAJI DHONDJI BIBVE, 1. L. R. 20 Bom. 630 ; S. C. Prin. Judg. for 1895, p. 236.

[*Mamlatdar—Jurisdiction—High Court, interference by—Civil Procedure Code (Act XIV of 1882, s. 622).*] The plaintiff sued in a Mamlatdar's Court for possession of certain land, alleging that the defendants held them under a lease, the time of which had expired. The Mamlatdar found the execution of the lease proved, but held it to be colourable, and that the defendant did not hold under it. He, therefore, rejected the plaintiff's claim. The plaintiff applied to the High Court in its extraordinary jurisdiction and obtained a rule to set aside the order, contending that the Mamlatdar had no jurisdiction to decide that the lease was colourable and that he ought not to have admitted evidence upon that point. Held (discharging the rule) that the matter was not one for the extraordinary jurisdiction of the High Court under section 622 of the Civil Procedure Code (Act XIV of 1882). The Mamlatdar had

not declined jurisdiction. He had considered the materials laid before him and had come to a conclusion. That conclusion, if erroneous, ought to be corrected in a regular suit and not by an application to the High Court under section 622 of the Civil Procedure Code (Act XIV of 1882).—KASHINATH SAKHARAM KULKARNI v. NANA, I. L. R. 21 Bom. 731; S. C. Prin. Judg. for 1896, p. 180.

[*Reference by Collector—Practice of High Court, departure from.*] The Collector of Ahmednagar referred a case to the High Court stating the following facts :—

Chimi mard Khusa Koli of Ratanwadi applied to the Mamlatdar for redress under the Mamlatdars' Courts Act on March 5th 1897. The Mamlatdar fixed the 20th March for the hearing and wrote the date himself. This was read as the 27th by his office, who prepared the summonses accordingly. The Mamlatdar corrected one set, but not the duplicates which were sent out uncorrected by the office for service. On the 20th no one was present and the Mamlatdar accordingly dismissed the plaint. Chimi and her witnesses were present on the 27th as summoned, when she was told that her plaint had already been dismissed. It will be hard on her to tell her to petition for revision herself, because she could not afford the expense such a course would entail. She has been in no wise to blame.

The High Court decided that as the case was one of much hardship on Chimi, and the error was that of the Mamlatdar, it would depart from its usual practice of not passing any order at the instance of Collector in such cases as this when the parties do not apply for it, and directed the Mamlatdar to hear the case after giving notice to the parties in the form given in Schedule B to the Act, both to the plaintiff and to the defendants.—CHIMI MARD KUSHA v. BHIMAYA VALAD RAMJI AND ANOTHER, Prin. Judg. for 1898, p. 40.

[*Execution of Mamlatdar's decision—Ouster of third person—Jurisdiction—S. 622 of the Civil Procedure Code.*] G got a decree for possession against P in a Mamlatdar's Court. In execution the Mamlatdar directed the ouster of C, who was in possession and who was not a party to the decree : Held, that the Mamlatdar's order for the execution of the decree by the ouster of C was without jurisdiction, and that it should be set aside under s. 622 of

the Civil Procedure Code (Act XIV of 1882).—CHINAYA v. GANGAVA, I. L. R. 21 Bom. 775.

[*Decree of a Civil Court—Joint possession—Dispossession of land by taking cocoanuts from trees—Mamlatdar's decision awarding possession—Jurisdiction—Remedy by a regular suit.*] In execution of the decree obtained in 1886 in a Civil Court the plaintiff and the defendants were put into joint possession of certain land. The plaintiff subsequently brought this suit in the Mamlatdar's Court to recover possession of the said land, alleging that the defendants by taking cocoanuts from trees standing thereon had dispossessed him of the said land otherwise than by due course of law. The Mamlatdar held that the plaintiff had been thereby dispossessed, and passed a decree ordering the defendants to deliver up possession of the land to the plaintiff together with the trees growing thereon. *Held*, that the Mamlatdar had no jurisdiction to pass the decree. The Civil Court had passed a decree giving the parties joint possession of the land, and the Mamlatdar had no jurisdiction to override that decision and to place the plaintiff in exclusive possession. By the decree of the Civil Court they were determined to be joint owners, and the remedy in case of unequal possession or taking of produce was a suit for an account or for partition. The Mamlatdar's order was accordingly set aside.—BHAU v. DADE KRISHNAJI, I. L. R. 21 Bom. 777.

[*Transfer of case.*] The High Court has jurisdiction to transfer a suit under the Mamlatdars' Courts Act (Bom. Act III of 1876), from the Court of one Mamlatdar to that of another.—BHAGWANDAS NAROTAMDAS v. JEDU VALAD BAPU, 4 Bom. L. R. 970.

The power of the High Court to pass equitable orders.

[*Possessory suit by landlord—Tenant's failure to pay rent—Waiver of right—Cause of action—Exercise of extraordinary jurisdiction by High Court—Equity.*] On an application under extraordinary jurisdiction against the order of the Mamlatdar of Poona, the High Court passed the following judgment :—

“ The Mamlatdar in this case was in error in supposing that, because there had been a failure to pay punctually on the 17th November 1884, the cause of action had arisen then, and consequently

his jurisdiction was excluded by the lapse of more than six months. There had apparently been a failure to pay, but there had been a subsequent acceptance in advance of the rent for 1884-85. Such acceptance constituted a waiver of the right to eject for the default and a renewal of the tenancy which then continued at least till 7th November 1885. On the latter date the rent due in advance was not paid, and on a liberal construction of the agreement, the defendants became subject to ejectment in a month, as they were bound to give up possession within that time in case of default. A tender at the plaintiff's house of the rent due should have been authenticated on that day in some trustworthy way as by taking two disinterested persons to witness the tender and then depositing the money and placing it at the disposal of the landlord. But when we are called on to exercise our extraordinary jurisdiction, we may properly use it so as to enforce equity, and here the landlord seems to have been anxious rather to avoid payment in order to gain a right of eviction against his tenants. In England, a tenant sued in ejectment under the landlord's right of re-entry on non-payment of rent is allowed a reasonable time within which to pay it, and in the present case, the provision that on default of payment of the year's rent in advance, the defendants were to give up the house within a month, seems to imply that absolute punctuality was not of the essence of the contract as intended by the parties. The delivery up at the end of a month would really deprive the landlord of a month's rent. The provision was a penal one hung *in terrorem* over the defendant to make them carry out the principal intent. This they seem to have been quite willing to do, though not with absolute precision, and the justice of the case will be met by the order to which the pleaders now assent that the defendants are to retain possession on payment of rent due and costs of the present proceedings within one month from this date. It is not to be understood that any want of punctuality is sanctioned or will be tolerated by the Court in future.—SHIVRAM BAPUJI SHINDE v. GANGADHAR LAKSHMAN, Prin. Judg. for 1887, p 154.

[*Mamlatdar's order for ejectment—Exercise of extraordinary jurisdiction by High Court—Equity.*] In an application to the High Court against the decision of a Mamlatdar in a possessory suit under the Mamlatdar for ejectment subject to its being reversed on the defendant's paying to the plaintiff the rent due and the

costs of the proceedings within a prescribed time.—**GANGADHAR RAMKRISHNA v. SAVITRIBAI**, Prin. Judg. for 1895, p. 206.

Services of the Government Pleader to an aggrieved cultivator.

The attention of all Collectors should be drawn to Government Resolution No. 2912 of to-day's date and to the Report of the Remembrancer of Legal Affairs circulated therewith, and they should be instructed to examine carefully the records of all cases tried by Mamlatdars under Bombay Act III of 1876 in the light of the Honourable Mr. Batty's comments. The Collector should at the same time be requested to issue similar instructions to the Assistant and Deputy Collectors under them, and informed that they are authorized to communicate with the Remembrancer of Legal Affairs regarding any cases in which they may find that a Mamlatdar has acted without jurisdiction, with a view to the requisite steps being taken to allow the services of the Government Pleader, free of charge, to an aggrieved cultivator illegally ousted from his land and willing that the Government Pleader should present a petition on his behalf under s. 622 of the Civil Procedure Code.—G. R. No. 2914, dated 18th April 1895, R. D.

Under section 195 cl. (b) of the Code of Criminal Procedure a sanction of the Mamlatdar's Court or some other Court to which such Court is Subordinate, is necessary for the prosecution of a person for an offence under this section.

24. The Court of the Judicial Commissioner
 of Sind may exercise over Mamlatdars' Courts in the Province of Sind the powers exercised by the High Court (A) of Bombay over Mamlatdars' Courts in other parts of the Bombay Presidency.

Power of the Court of the Judicial Commissioner of Sind.

This section is new.

(A) "HIGH COURT."

"High Court," used with reference to civil proceedings, means the Highest Civil Court of appeal in the part of the

Bombay Presidency in which the Act containing the expression operates (a).

The Sind Sadar Court having held that it is not vested with powers of revision over the Mamlatdars' Courts, the opportunity has been taken of providing for these Courts in Sind revisional control identical with that exercised by the High Court in the rest of the Presidency (b).

25. Any plaintiff (A) subscribing and verifying (B) any plaint (C) under this Punishment for verification of false plaint. Act which he either knows (D) or believes to be false, or does not believe to be true, in any material point (E), shall be deemed to have committed an offence punishable under section 193 (F) of the Indian Penal Code.

This is section 20 of the old Act, a little modified ; and, though similar to section 199 of the Indian Penal Code, it differs from it.

In order to prove an offence under this section the prosecution must urge and prove that—

1. The plaintiff has *subscribed* the plaint under this Act.
2. He has *verified* it under this Act.
3. He *knows* or *believes* it to be false ; or does not believe it to be true.
4. Such knowledge or belief must relate to a *material* point in the plaint.

(A) " ANY PLAINTIFF."

The word " *plaintiff* " includes a pleader and a recognised agent. (See *ante* s. 3, cl. (b)).

This section says nothing about a *defendant*, because he is not required by this Act to subscribe and verify any paper.

(a) Bombay Act I of 1904, s. 3, cl. 22.

(b) See the Report of the Select Committee published in the Bombay Government Gazette, Part VII, dated 26th February, 1906, p. 7.

He is not required by this Act to put in a written statement as is done by a defendant in a civil case under s. 110 of the Civil Procedure Code, 1882, duly subscribed and verified by him under s. 115.

(B) " SUBSCRIBING AND VERIFYING."

Both the acts of subscription and verification must be performed by the *same* individual, whether he be plaintiff, or his pleader or recognised agent. Otherwise it will not be an offence under this section. If the plaint is subscribed by the plaintiff and verified by the pleader or recognized agent (a), or subscribed by the pleader or recognised agent, or subscribed by the pleader and verified by the recognised agent, or subscribed by the recognised agent and verified by the pleader, it will not be an offence under this section.

The word "*plaintiff*" is used in the singular number; but the words in the singular include the plural (b). If a plaint is duly subscribed and verified under s. 10 by several plaintiffs or their pleaders or recognised agents, then if the other essentials of the offence are present, it is quite plain that those who have subscribed and verified the plaint, will all be guilty of this offence.

The Mamlatdar's endorsement under s. 11 *ante* is *prima facie* proof of the due subscription and verification of the plaint. For the maxim of law is *omnia presumuntur rite esse acta*, *i. e.*, all official things are presumed to have been done rightly (c). This presumption may, however, be rebutted by proper legal evidence on behalf of the accused (the plaintiff or his pleader or recognised agent).

(C) " ANY PLAINT."

To prove an offence under this section the prosecution must produce the original plaint and prove the signature of

(a) SAYAD SAIFULLA V. SAYAD HAJI MIA, 1 Bom. L. R. 664.

(b) Bombay General Clauses Act (I of 1904), s.13, cl. (b).

(c) Wharton's Law Lexicon, 10th Ed., p. 547 ; Broom's Legal Maxims, 7th Ed., p. 720 ; Act I of 1872, s. 114, illustration (c).

the plaintiff or his pleader or recognised agent as the case may be. A certified copy will not do, unless under circumstances which admit of secondary evidence. Even then the mere production of a certified copy is insufficient. Further, evidence will be necessary to connect the plaintiff with the original, and to show that *he* actually signed it, and knew its contents. It is necessary to give at least *prima facie* evidence of actual knowledge of the contents. For legal documents are generally prepared by a *vakil* and signed on trust. Where the document avowedly comes from an agent, the strictest proof would be necessary that the contents of the particular document were known to, and understood and authorized by, the principal. Where the agency is created by writing, the production of the original *Muktyarnama* is indispensable (a).

(D) " WHICH HE EITHER KNOWS."

The state of the plaintiff's mind at the time he subscribed and verified the plaint cannot be proved directly ; but surrounding circumstances will ordinarily furnish sufficient facts, from which it can be inferred that he knew or believed the plaint to be false, or did not believe it to be true (b).

As regards the material facts stated in the plaint, there can generally be little doubt that if any of them be false, the plaintiff must have known it to be so. A man may express a belief founded on a variety of circumstances present to his mind at the time he formed the belief. The circumstances may still be present to his mind, or they may have vanished, leaving merely the strong recollection that they had led him to a state of belief, which he has no doubt was well founded at the time. Provided he states his belief honestly, his statement is true, although he cannot state the grounds for it, or although his reasons were erroneous, or his conclusion unsound. Where a statement involves a mixed question of law and fact, a man who is honestly mistaken in the law, and states accordingly,

(a) Mayne's Criminal Law, 2nd Ed., § 347.

(b) Starling's Indian Criminal Law, 8th Ed., p. 273. See QUEEN-EMPERESS v. MEURBAN SINGH, I. L. R. 6 All. 626.

is not criminally liable, on the principle that ignorance of law is no excuse (a).

(E) " IN ANY MATERIAL POINT."

It must be borne in mind that the materiality of the subject-matter of the plaint is a substantial part of the offence defined in this section. If the matter which is the subject of the charge under this section be wholly immaterial, it may often be successfully contended that the knowledge of its falsity, which is necessary to constitute the offence, has not been made out. Where a party deliberately makes an allegation in a plaint as to a very material circumstance, to which his attention is likely to have been directed, and where this false statement is for his benefit, we should presume that the plaintiff knew that he was making a false plaint. But no such presumption can arise where the allegation contained in the plaint is irrelevant (b).

(F) " PUNISHABLE UNDER SECTION 193."

The law in force for the punishment of persons intentionally giving or fabricating false evidence is contained in s. 193 of the Indian Penal Code, which runs as follows :—

"193. Whoever intentionally gives false evidence in any stage of judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

(a) See Mayne's Criminal Law, 2nd Ed., p. 555 ; Starling's Criminal Law, 8th Ed. p. 273 ; REG. v. TOOKARAM, Bom. H. C. Cr. Rul., dated 11th September 1862 ; QUEEN v. ECHAN MEEAH, 2 W. R. Cr. 47 ; QUEEN v. MAHOMED HOSSAIN, 16 W. R. Cr. 37 ; QUEEN-EMPERESS v. MEHRBAN SINGH, I. L. R. 6 All. 626.

(b) See Mayne's Criminal Law, 2nd Ed., p. 564.

Explanation 1.—A trial before a Court Martial or before a military Court of Request is a judicial proceeding.

Explanation 2.—An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration.

A in an enquiry before a Magistrate for the purpose of ascertaining whether Z ought to be committed for trial, makes on oath a statement which he knows to be false. As this enquiry is a stage of a judicial proceeding, A has given false evidence."

No written statement is required to be put in by the defendant under this Act. But if a written statement not required by law to be verified is unnecessarily verified and put in and if it contain any false statement, it cannot be made the subject of a criminal prosecution for giving false evidence.—See REG. v. KARTICK CHUNDER, 9. W. R. Cr. R. 58; S. C. 5 R. C. C. Cr. 58; IN RE KASI CHUNDER, I. L. R. 6 Calc. 440; IN RE HARAN MANDAL, 2 Beng. L. R. Cr. 1.

[*Giving false evidence—Sanction—Mamlatdar's Court—The Code of Criminal Procedure, Act X of 1872, s. 468.*] In a possessory suit brought by Ravji against Savanta the Chikodi Mamlatdar rejected the claim and expressed an opinion that the witnesses should be prosecuted for giving false evidence; but before giving his formal sanction to such prosecution he died. The defendant thereupon applied to the Collector for the necessary sanction; but he ruled that the Court of the Mamlatdar was not a Civil Court within the meaning of s. 468 of the Code of Criminal Procedure, and that no sanction was necessary to prosecute witnesses for giving false evidence in the Court of the Mamlatdar. Savanta accordingly preferred complaints before Mr. Guerin, Magistrate, F. C. at Chikodi, who dismissed them, holding that the Court of the Mamlatdar was a Civil Court, and that the complaints could not be proceeded with without a formal sanction of the successor in office of the deceased Mamlatdar. The defendant, therefore, applied to the High Court, praying for a reversal of the Magistrate's order, or for a fresh sanction by that Court itself. The judgment of the Court was delivered by—

KEMBALL, J.—We have heard this matter fully argued, and are of opinion that the First Class Magistrate was right in holding that he had no jurisdiction to entertain the complaint without sanction of the Court of the Mamlatdar in which the alleged offence was committed. It is contended for the applicant that the Mamlatdar's Court is not a Civil Court within the meaning of the Criminal Procedure Code, and in support of this contention we have been referred to sections 435 and 438 of the same Code in which a Revenue Court is spoken of as distinct from a Civil Court, and also to section 18 of Bombay Act III of 1876, where a distinction is drawn between a Mamlatdar's Court and a Civil Court. To what class of Court the term "Revenue Court" in the Criminal Procedure Code relates we have no means of knowing; nor indeed, do we understand why any distinction should have been drawn in the sections above quoted between it and a Civil Court, but that Code applies to the whole of British India, and it has been held in this Presidency in the cases of MAHADAJI v. SONU (9 Bom. H. C. Rep. 249) and BAI JAMNA v. BAI JADAO (I. L. R. 4 Bom. 168) that a Mamlatdar's Court is a Civil Court, so that the only question we have to consider is whether it is so in the sense of section 468 of the Criminal Procedure Code. No doubt a distinction is taken in Bombay Act III of 1876 between a Mamlatdar's Court and an ordinary Civil Court; but we are unable to discover any intelligible reason why the term Civil Court should be taken in the restricted sense of an ordinary Civil Court, as distinguished from a Mamlatdar's Court, or why sanction for prosecution should not be as necessary and desirable in the case of an offence committed before or against the Mamlatdar's Court as in one committed against the ordinary Civil Court. See sections 468 and 469 respectively. The terms "a Civil Court" and "any Civil Court" seem to us necessarily to include a Mamlatdar's Court, and we cannot suppose that the Legislature intended to give to suitors in such Courts unlimited powers of prosecution. We understand that the Mamlatdar, who disposed of the particular case out of which this question has arisen, is dead; but he appears to have been prepared to give the requisite sanction. We are not aware whether any application has been made to his successor; but if not, it will rest with him, on application being made, to consider whether or no to grant it now.—IN RE SAVANTA, I. L. R. 5 Bom. 137

Remark.—But now see Act V of 1898, s. 195 (7), cl. (c).

See the notes under s. 23 *ante*.

26. No suit shall lie under this Act—
Bar of certain suits.

(a) against Government or against any officer of Government (A) in respect of any act done or purporting to be done by any such officer in his official capacity (B), except where acting as a manager (C) or guardian duly constituted under any law for the time being in force; or

(b) in respect of any dispossession (D), recovery of possession or disturbance of possession, that has been the subject of previous proceedings, to which the plaintiff or his predecessor in interest was a party, under this Act, or in a Civil Court, or under Chapter XII of the Code of Criminal Procedure, 1898.

This section is new.

(A) " AGAINST GOVERNMENT OR AGAINST ANY OFFICER OF GOVERNMENT."

There was no such provision as is contained in clause (a) of this section in the repealed Bombay Act III of 1876. Yet the law was clear.

The Crown is not bound by a statute unless named in it. It has been said that the law is *prima facie* presumed to be made for subjects only; at all events, the Crown is not reached except by express words, or by necessary implication, in any case where it would be ousted of an existing prerogative or interest. It is presumed that the Legislature does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible. Where, therefore, the language of the statute is general, and in its wide and natural sense would divest or take away any prerogative or right from the Crown, it is construed so as to exclude that effect. When the king has any prerogative, estate, right, title or interest, he shall not be barred of them by the general words of a statute (a).

(a) Maxwell's Interpretation of Statutes, 4th Ed., p. 202.

Section 15 of the Bombay Revenue Jurisdiction Act (X of 1876) enacts that a suit in which the Government or any officer of Government in his official capacity is a party, shall be instituted in the Court of the District Judge *alone*, and the maxim of law is *expressio unius est exclusio alterius* (a), *i. e.*, the express mention of one thing implies the exclusion of another. The Bombay Revenue Jurisdiction Act (X of 1876) is an Act of the Supreme Legislature and the Bombay Mamlatdars' Courts Act (III of 1876) is an Act of the Local Legislature, and it is not competent to the Local Legislature, to create a Court with power to entertain a suit in which the Government or any officer of Government in his official capacity is a party when the Supreme Legislature has enacted that such a suit shall be instituted in the Court of the District Judge alone (b).

The reason of this enactment is that suits in which the Government or any officer of Government in his official capacity is a party, involve as a rule questions of great and urgent importance to the community (c). Therefore the only proper forum for bringing such suits is the Court of the District Judge.

The Bombay High Court decided in *BALVANTRAO v. SPROTT* (d) that a Mamlatdar has jurisdiction, under Bombay Act III of 1876, to hear and determine a suit brought against officers of Government for acts purporting to have been done by them in their official capacity. Recently, however, in *MOTILAL VIRCHAND v. THE COLLECTOR OF AHMEDABAD* (e), the same High Court decided that a Mamlatdar's Court, under Bombay Act III of 1876, has no jurisdiction to try a suit to which a Collector is a party.

Now cl. (a) of this section settles the statutory law on this point.

(a) *Broom's Legal Maxims*, 7th Ed., p. 491.

(b) See also the judgments of Aston, J. in *MOTILAL VIRCHAND v. THE COLLECTOR OF AHMEDABAD*.

(c) *Gazette of India*, Part V, 16th October 1875, p. 212.

(d) I. L. R. 23 Bom. 761.

(e) 8 Bom. L. R. 904.

[*Mamlatdar's Court—Suit against officers of Government in their official capacity—Jurisdiction—Act XIV of 1869, s. 32—Act X of 1876, s. 15.*] The point raised in this application is whether a Mamlatdar's Court has jurisdiction under the Bombay Act III of 1876 to hear and determine a suit brought against officers of Government for acts purporting to have been done by them in their official capacity.

PARSONS, J. :—The Mamlatdar held that he had jurisdiction, and we think that in this he is right. His Court is a Civil Court; the only enactment cited to us as restrictive of the powers of Civil Courts in their jurisdiction over persons is section 32 of the Bombay Civil Courts' Act, 1869, but it mentions Subordinate Judges and Courts of Small Causes only, and the Court of a Mamlatdar is neither of these.

RANADE, J. :—It is admitted that the Mamlatdars' Act is silent on the point, and contains no limitation as regards the parties to possessory suits over which these Courts have jurisdiction. Section 10 of the Act directs the Mamlatdar to return the plaint if the subject of the plaint is not within his jurisdiction. It is, however, contended that as under s. 32 of Act XIV of 1869 as amended by s. 15 of Act X of 1876, the Subordinate Judges cannot receive or register a suit in which the Government or any officer of Government is a party in his official capacity; the same restriction should obtain in the case of Mamlatdars' Courts, where, as in the present suit, officers of Government are defendants. It may be argued, on the other hand, that questions of jurisdiction cannot be properly decided on grounds of presumption or analogy. Though, under section 32 of Act XIV of 1869, the Subordinate Judges' Courts had no jurisdiction over Sirdars who could only be sued in the Agents' Courts, these latter were subject to the jurisdiction of Small Cause Courts in the Mofussil until the Act of 1887 was passed. Similarly, Courts of Small Causes were not subject to the same limitations as those which bound the Subordinate Judges' Courts till s. 15 of the Bombay Revenue Jurisdiction was amended. It was only this section which included Small Cause Courts with Subordinate Judges' Courts as being subject to this restriction of their powers in suits to which Government or an officer of Government acting in his official capacity is a party. The Mamlatdar had, therefore, jurisdiction to entertain this suit. It is further clear also that the

provisions of section 424 of the Civil Procedure Code have no application in respect of the acts of public officers which could not possibly be said to have been done by them in their official capacity. On the whole I feel satisfied that the Mamlatdar's Court had jurisdiction to entertain this suit, though irrigation officers were defendants.—BALWANTRAO v. SPROTT, I. L. R. 23 Bom. 761; S. C. 1 Bom. L. R. 414.

[*Mamlatdar's Court—Suit against Collector—Jurisdiction—History of the Mamlatdars' Courts.*] The question referred to the Full Bench is whether Mamlatdars are empowered by the Bombay Mamlatdars' Act (III of 1876) to entertain and decide suits to which the Collector is a party.

RUSSELL, A.G. O. J.—From the various Regulations and Statutes relating to Mamlatdars it appears that down to the time of the passing of Bombay Act V of 1864 the Mamlatdar was considered and treated as the subordinate officer of the Collector, and although that Act gave him the original jurisdiction, it is impossible to come to conclusion that the Legislature intended by that Act to alter his status with regard to the Collector. Original jurisdiction might be given to him consistently with his occupying the same position with regard to the Collectors as he did before that Act was passed. It could not have been intended by the Legislature to empower the Mamlatdar to sit in judgment upon the action of his superior officer in his Revenue capacity as he would have to do if the suit were allowed to be maintained in his Court. The question submitted must, therefore, be answered in the negative. As it is necessary to decide whether a suit will lie against a public officer acting in his public capacity, the effect of this judgment will be to limit the effect to the judgment in BALWANTRAO v. SPROTT, (I. L. R. 23 Bom. 761), to public officers other than Collectors.

Editor's note.—It may be considered here that although a District Judge is a servant and subordinate of the Government, he can hear and decide a case in which the Government is a party, and the High Court can hear an appeal against his decision in such a case.

(B) "IN HIS OFFICIAL CAPACITY."

The question whether or not the act complained of is done by an officer of Government in his official capacity cannot be determined by the description given by the plaintiff himself of his suit. He cannot select the forum of jurisdiction by a

statement that he sues the officer of Government not in his official capacity but as a private individual. This question of the Court in which the suit is to be tried must be determined from the contents of the plaint and a consideration of the position occupied by the defendant. The question is not whether the acts were legal or illegal, but whether the acts done by an officer of Government were done by him in his official capacity (a). It cannot be argued that the acts are not official acts because they were wholly illegal and unjustified by any Act or Regulation. An official act is not necessarily a legal act, it may be a most illegal one. The Legislature has not in section 15 of the Bombay Revenue Jurisdiction Act, 1876, given any immunity or protection. All it has done is to, provide a particular forum for a trial of suits against Government officers for acts done by them in their official capacity. The question then turns not on whether the acts were legal or illegal, right or wrong, justifiable or unjustifiable, but on whether the acts were or were not official acts, that is to say, done by the officer acting and purporting to act in an official capacity (b).

**(C) "EXCEPT WHERE ACTING AS A
MANAGER."**

For instance, if an officer of Government is appointed a guardian of any minor under Act VIII of 1890, or if he is appointed an administrator of any intestate property under ss. 9 and 10 of Bombay Regulation VIII of 1827, or if he is appointed curator under Act XIX of 1841, a suit may be brought against such officer in the Mamladar's Court under this Act.

**(D) "IN RESPECT OF ANY DISPOS-
SESSION."**

This clause is inserted in view of the rulings in **RAM-CHANDRA v. NARSINHACHARYA**, I. L. R. 24 Bom. 251, and **NAGAPA v. SAYAD BUDRUDIN**, I. L. R. 26 Bom. 353. Remedies

(a) **WAMAN v. DIPCHAND**, Prin. Judg. for 1888, p. 121; **SWAMIRAYACHARYA v. THE COLLECTOR OF DHARWAR**, I. L. R. 15 Bom. 441; S. C. Prin. Judg. for 1890, p. 368.

(b) **WILLIAM ALLEN E^Q. v. BAI SHRI DARIABA**, Prin. Judg. for 1896, p. 138.

under the Mamlatdars' Courts Act, on the one hand, and the Specific Relief Act, 1877 (I of 1877), and the Criminal Procedure Code, 1898 (Act V of 1898) on the other hand, should be alternative and not cumulative. So that a plaintiff, who is defeated in the Mamlatdar's Court, cannot seek to upset the Mamlatdar's decision by a fresh suit under s. 9 of the Specific Relief Act in a Civil Court, or by taking proceedings under cl. 6, s. 145 or s. 147 of the Code of Criminal Procedure (a).

The provision in clause (b) is founded on the maxim *nemo debet bis vexari pro una et eadem causa*, i. e., no man shall be twice vexed for one and the same cause (b). There is another maxim in connection with this, namely, *interest rei publicæ ut sit finis litium*, i. e., it concerns the state that there be an end of law suits. Otherwise while men are themselves mortal, their actions would be immortal. Hence the rule is that the former judgment, while it stands, is conclusive between the parties, if either attempts, by commencing another action, to re-open that matter (c). There is a provision to this effect in s. 13 of the Civil Procedure Code, 1882, and in s. 403 of the Criminal Procedure Code, 1898. But these Codes do not apply to the Mamlatdars' Courts; and as there was no such provision in the Bombay Act III of 1876, this clause (b) is enacted.

[*Possessory suit in Mamlatdar's Court—Dismissal of suit on the merits—Subsequent suit in Civil Court under s. 9 of the Specific Relief Act (I of 1877).*] A possessory suit filed in the Mamlatdar's Court was dismissed by the Mamlatdar on the merits. The plaintiff thereupon filed another suit under s. 9 of the Specific Relief Act (I of 1877) in a Civil Court which allowed the claim and passed a decree in his favour. The Defendant applied to the High Court in its extraordinary jurisdiction and contended that the plaintiff's claim was *res judicata* and that the Mamlatdar's decree barred the second suit. Held, that having regard to s. 18 of the Mamlatdars' Courts Act (Bom. Act III of 1876) the Mamlatdar's decision was not conclusive, and that the plaintiff was entitled to

(a) See the Statement of Objects and Reasons, published in the Bombay Government Gazette, Part VII, dated the 26th of September, 1906.

(b) Broom's Legal Maxims, 7th Ed., p. 259.

(c) Wharton's Law Lexicon, 10th Ed., p. 414.

bring the second suit under s. 9 of the Specific Relief Act (I of 1877).—RAMCHANDRA BALAJI v. NARSINHACHARYA YEDUNATHACHARYA, I. L. R. 24 Bom. 251.

[Previous order of Magistrate under s. 145, Criminal Procedure Code (Act V of 1898)—Mamlatdar—Possessory suit—Jurisdiction.] On the 22nd of December 1900, a Magistrate passed an order under s. 145 of the Criminal Procedure Code (Act V of 1898), deciding that, on the 20th of October 1900, one Sayad Martooza was in actual possession of certain land. On the 6th of March, 1901, the plaintiff brought this suit against the defendants (of whom the said Sayad Martooza was one) to recover possession of the said land, alleging that on the 10th of October, 1900, the defendants had wrongfully dispossessed him of it. The Mamlatdar held that having regard to the Magistrate's order of the 22nd December, 1900, he had no jurisdiction to hear the suit. On application to the High Court, held (remanding the case for disposal) that the Mamlatdar had jurisdiction to try the case. LILLU v. ANNAJI (I. L. R. 5 Bom. 387) distinguished.—NAGAPPA v. SAYAD BADRUDIN, I. L. R. 26 Bom. 353 ; S. C. 3 Bom. L. R. 919.

SCHEDUL A.

FORM OF NOTICE TO BE ISSUED TO THE DEFENDANT UNDER SECTION 14.



No. of SUIT.

In the Court of the Mamlatdar of

Plaintiff.

Defendant.

TO DEFENDANT—(name, age, religion, caste, profession and place of abode).

WHEREAS (here enter the name, age, religion, caste, profession and place of abode of the plaintiff) has instituted a suit in this Court against you (here state the particulars of the plaint) :

You are hereby summoned to appear in this Court at the village of in person or by duly authorized agent

on the day of at o'clock m., to answer the above-named plaintiff ; and, as the plaint will be finally disposed of on that day, you must adopt measures to produce your documents and procure the attendance of your witnesses at the hour and place above fixed ; and you are hereby required to take notice that, in default of such appearance at the before-mentioned time and place, the suit will be heard and determined in the absence of yourself and your agent.

Dated this day of 19 .

(Signed)

Mamlatdar.

Note.—If you require your witnesses to be summoned by the Court, you should make an application to that effect to the Court without delay, so as to allow of the service of the summonses a reasonable time before the within-mentioned date.

SCHEDULE B.

FORM OF NOTICE TO BE ISSUED UNDER SECTION 16.

Seal of the
Court.

No. of Suit.

In the Court of the Mamlatdar of

Plaintiff.

Defendant.

TO PLAINTIFF (or DEFENDANT, as the case may be).

WHEREAS, in the suit above specified, instituted in this Court by , the Court ordered on the day of

last that , and the said plaintiff (or defendant, as the case may be) has, under date the day of , applied to this Court to re-hear the case on the grounds that (here state the grounds) :

This is to give you notice that the said application will be heard and determined on the day of at o'clock m., at the village of , and you are hereby required to take notice that, in default of your appearance personally or by agent at the said time and place, the application

will be heard and determined in your absence and, if granted, a time and place for re-hearing the suit will then be fixed.

Dated this day of 19 .

(Signed)

Mamlatdar.

SCHEDULE C.

FORM OF INJUNCTION TO BE ISSUED UNDER SECTION 21,
SUB-SECTION (2).



No. of Suit.

In the Court of the Mamlatdar of

Plaintiff.

Defendant.

To DEFENDANT.

WHEREAS in the suit above specified the Court has this day found that you have disturbed or obstructed (or that you have attempted to disturb or obstruct) the said plaintiff in his possession of the under-mentioned property (or enjoyment of the under-mentioned use of water or use of roads, or otherwise as the case may be) by (here describe the disturbance or obstruction or attempted disturbance or obstruction found proved):

You are hereby prohibited from making any further attempt to disturb or obstruct (if necessary set forth the particular kind of disturbance or obstruction which the defendant is enjoined not to repeat) the said plaintiff in his possession of the said property (or otherwise as the case may be) otherwise than in execution of the decree of a competent Civil Court.

Dated this day of 19 .

(Signed)

Mamlatdar.

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